Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

SHAWN DEON HUTCHINSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael E. Duggan

Wayne County
Prosecuting Attorney

*Timothy A. Baughman
Chief of Research,
Training, & Appeals

Thomas M. Chambers
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 313-833-4596

*Counsel of Record

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STATEMENT OF THE QUESTION

Ineffective assistance of counsel based on a conflict of interest claim requires a showing of an actual conflict of interest that adversely affected counsel's performance, but does not require the showing of prejudice required by *Strickland v. Washington*.[1] There is a split in federal circuits as to whether adverse effect can be shown without a demonstration that an alternative strategy not followed would have been objectively reasonable under the circumstances, and the Michigan Court of Appeals has followed those circuits holding that no showing of objective reasonableness is required. Should this Court grant certiorari to resolve this conflict in circuits on this important question?

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[1] 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984).

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Now Comes the State of Michigan, by **Michael E. Duggan**, Prosecuting Attorney for the for the County of Wayne, **Timothy A. Baughman**, Chief of Research, Training, and Appeals, and **Thomas M. Chambers**, Assistant Prosecuting Attorney, Appeals, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Court of Appeals, entered in this case on August 23, 2002, leave denied by the Michigan Supreme Court on December 26, 2002.

OPINIONS BELOW

The trial court entered an Opinion and Order granting Respondent a new trial on November 13, 2001, and is, and is attached as **Appendix A**. The Opinion of the Michigan Court of Appeals is unpublished, and is attached as **Appendix B**. The Order of the Michigan Supreme Court denying leave to appeal is attached as **Appendix C**.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

Respondent was charged in a criminal Information with the offense of possession with intent to deliver cocaine in the amount of 650 grams or more, in violation of Michigan Compiled Laws 333.7401(2)(a)(i). The matter was bench-tried on June 21, 1995, and Respondent was found guilty of simple possession of cocaine in an amount of 650 grams or more. Michigan Compiled Laws 333.7403(2)(a)(i). The matter was set for sentencing on July 13, 1995.

Sentencing was then adjourned numerous times, until finally, on April 1, 1996, the trial court, upon being apprized that the offense of which Respondent was convicted carried a mandatory parolable life sentence, stated that its recollection had been that it had found Respondent guilty of *attempted* possession of cocaine in an amount of 650 grams or more, and not possession (Transcript, 4/1/96, 5). The prosecutor countered that the court had found Respondent guilty of possession of cocaine in an amount of 650 grams or more (7-11). The court stated that attempted possession of over 650 grams of cocaine was what it would be sentencing Respondent for (16-17). On April 26, 1995, Respondent was sentenced to a minimum of 40 months and a maximum of 60 months imprisonment.

Petitioner appealed by right the action of the trial court in "correcting" its original verdict of possession of over 650 grams of cocaine. On July 22, 1997, the Michigan Court of Appeals reversed the trial court's alteration of the original verdict in a published Opinion, see *People v Hutchinson,* 224 Mich.App. 663, 666, 569 N.W.2d 858 (1997), which held:

> Accordingly, the original verdict of guilty of possession of more than 650 grams of cocaine is reinstated, and the cause is remanded to the Wayne County Circuit Court for resentencing.

Thereafter, the Michigan Supreme Court denied Respondent's Delayed Application for Leave to Appeal by Order of March 31, 1998. 456 Mich 956 (1998).

Instead of resentencing Respondent as the Michigan Court of Appeals' Opinion had directed, the trial court entertained Respondent's Motion for New Trial, and granted Respondent's Motion.

Petitioner filed with the Court of Appeals an Emergency Application for Leave to Appeal the trial court's Order granting Respondent a new trial, and the Michigan Court of Appeals issued an Unpublished Per Curiam Opinion reversing the Order granting Respondent's Motion for New Trial and remanded the matter for reinstatement of the original verdict of possession of over 650 grams of cocaine and for resentencing before a different judge.

Respondent filed an Application for Leave to Appeal with the Michigan Supreme Court, seeking leave to appeal the Court of Appeals' Opinion and Order, which was denied by the Michigan Supreme Court. 613 N.W.2d 727 (2000).

In the trial court, the matter was blind-drawn to another courtroom for implementation of the Michigan Court of Appeals' directive that Respondent be resentenced on the reinstated conviction of possession of more than 650 grams of cocaine.

Respondent then filed with the trial court a Motion for New Trial and Amended Motion for New Trial. On February 22, 2001, March 30, 2001, and April 11, 2001, the trial court took testimony relative to the issues raised in Respondent's Motions for New Trial.

On November 13, 2001, the trial court issued an Opinion and Order granting Respondent's Motion for New Trial on two bases: 1) conflict of interest, and 2) newly discovered evidence (this Opinion and Order is attached as **Appendix A**).

Petitioner filed with the Michigan Court of Appeals an Emergency Application for Leave to Appeal the trial court's Opinion and Order of November 13, 2001.

The Michigan Court of Appeals granted Petitioner's Application, and on August 23, 2002, the Michigan Court of Appeals issued an Opinion affirming in and reversing in part the trial court's Opinion and Order. The Court of Appeals affirmed the court's decision that Respondent was entitled to a new trial based on conflict of interest, but reversed the grant of a new trial based on newly discovered evidence (this Opinion is attached as **Appendix B**).

The Michigan Supreme Court then denied Petitioner's Application for Leave to Appeal the Michigan Court of Appeals Opinion by Order of December 26, 2002 (this Order is attached as **Appendix C**).

Statement of Facts

A) The Waiver Trial
i) Testimony at the Waiver Trial

The first prosecution witness, Robert Kane, testified that he was a Detroit Police Officer, presently assigned to the Tactical Services Section (Transcript, 6/21/95, 5). He testified that on January 11, 1994, at about 10:40 a.m., he had occasion to be in the area of 12th Street and Sycamore in the City of Detroit (5-7).

On the above date, at the above time, in the above location, he observed Respondent, whom he identified in court, driving westbound on Sycamore in a 1989 black Toyota; Respondent was the only occupant of the vehicle (6-7). What called the attention of he and his partner to Respondent's vehicle was that Respondent ran the stop sign at 12th Street and then failed to signal the right turn he made onto 12th (7). His partner, Officer Schipper, who was driving their vehicle, a fully marked police vehicle (12), activated the lights of their police vehicle and blew the air horn which their vehicle was also equipped with (7). The air horn was very loud; in addition, the lights which his partner activated were the red and blue flashing lights which all

marked police vehicles were equipped with (12). Their purpose was to effectuate a traffic stop; Respondent, however, did not stop, even though the air horn was blown more than once during the chase (11). From the intersection where Respondent ran the stop sign, Respondent went to Myrtle Street where he made a left turn (7). Respondent, at this time, was traveling at a moderate rate of speed; he wasn't doing the speed limit, but this was not a high speed police case (8). Their pursuit of Respondent lasted less than a minute and encompassed from between a quarter of a mile and half of a mile (8). What ended the pursuit was Respondent pulling his vehicle into the driveway of what appeared to be a vacant dwelling and stopping there; the address of the vacant dwelling was 3557 15th Street (8). He (Officer Kane) was sitting in the rear right passenger seat of the police vehicle (8). There was another officer as well besides he and Officer Schipper – this was Officer Randy Wilson; all three of them were in uniform (12). When Respondent stopped in the driveway of the vacant dwelling, he (Officer Kane) immediately exited the police vehicle and ran towards the driver's side of the '89 Toyota; he was met by Respondent, who, he believed, was trying to get out of the vehicle (8-9); it was his (Officer Kane's) belief that Respondent was going to try to run (9). He (Kane) got to Respondent's vehicle before Respondent could do anything (9). Respondent was asked for his driver's license and could not produce one (9-10).

After Respondent was placed in custody, for no operator's license on person, he (Officer Kane) looked inside Respondent's vehicle from the vantage point of the driver's side door of the vehicle; the driver's side door was open at that point (10). What he observed, on the floorboard of the vehicle, near the front seat, was a gray plastic bag; the bag was not quite under the seat but right at the edge, in plain view (10). If he were sitting in the driver's seat of the '89 Toyota, he could have seen part of the bag on the floor (10). There was writing on the bag, "Broadway at Livernois"; the

bag was not that big of a bag, about the size of a shirt bag (11).

He (Officer Kane) retrieved the bag (13). He opened it up and observed inside of it 11 clear plastic bags, each containing a white substance which he believed to be pure cocaine (13). The white substance was powdery and he had seen such a substance before in his career – anywhere from 50 to 100 times before (13). He took control of the baggies and placed them into an evidence tag on Lock Seal Folder 377259 (14). The parties then stipulated that the contents of Lock Seal Folder 377259 had been inspected and analyzed by Ronald K. Smith, a chemist for the Detroit Police Department Narcotics Analysis Section of the Crime Lab, and that he would testify that the total weight of lock seal folder 377259 was 794.7 grams and that it was cocaine (14).

The next prosecution witness, Detroit Police Officer James Schipper, testified that he was presently assigned to the Tactical Services Section of the Police Department (Transcript, 6/21/95, 22). He testified that on January 11, 1994, he was in a police vehicle with two other officers, Officer Robert Kane and Officer Randy Wilson (22). He testified that at about 10:40 a.m., a black 1989 Toyota came to his attention when it disregarded a stop sign and then made a right turn without signaling at Sycamore and 12th Street (22-23). He (Officer Schipper) was driving the police vehicle; the police vehicle was a fully marked police vehicle and he (Officer Schipper) was in full uniform (23). Upon observing the Toyota vehicle do what it did, he proceeded to try to catch up to the Toyota; this was while the Toyota was on Myrtle and he tried to stop the vehicle for the violation (23). Respondent, whom he identified in court, was the driver of the Toyota (23). By attempting to stop Respondent, he meant that he activated his overhead lights as well as the horn, and he also put on the spot light (24). Respondent did slow down, but he did not stop (24). Respondent continued on Myrtle to 15th Street where he turned north; he then pulled into the driveway of an address

on 15th (24). He (Officer Schipper) pulled up on the street in front of the driveway (24). Before he brought their police vehicle to a complete stop, Officer Kane exited the police vehicle and ran up to Respondent's vehicle; at that point, Respondent was exiting his vehicle (24-25). Officer Kane stopped Respondent and then he (Officer Schipper) came up to where Officer Kane and Respondent were and Respondent was advised of why he had been stopped (25). Respondent was asked for his driver's license, but could not produce one (25). Respondent was placed under arrest for no operator's license on person (25). After he (Officer Schipper) placed Respondent under arrest, he observed Officer Kane recover a bag from Respondent's vehicle (25). He himself looked inside the bag and observed white powder packaged in numerous envelopes (25). During his own custodial search of Respondent, he confiscated a beeper off of Respondent's person and some money. The Toyota was conveyed to the Third Precinct and placed on evidence, as was the beeper (25-26). Because of the amount of the narcotics involved in the case, Sergeant McNamara was called to the scene (26).

On cross-examination, Officer Schipper was asked if he did a check as to who owned the car Defendant had been driving; he responded that he did and found that the Toyota belonged to a person named Leigh Harcourt, who lived in Southfield (30).

The last prosecution witness was Detroit Police Sergeant Arthur McNamara. He testified that he was assigned to the Narcotics Section of the Police Department (Transcript, 6/21/95, 31). He testified that on January 11, 1994, he was off duty (32). He was called to the Third Precinct, however, and was informed that a large amount of narcotics had been confiscated (32). He was informed that the vehicle had been impounded and he went to look inside the vehicle (32). Inside the vehicle, he found a black "Billion Bay" waist coat, in a men's large size, and a blue undershirt, size large, a pair of black Levi's pants, waist 32/length 34, and a pair of Reebok white tennis shoes

trimmed in green and black, size 9 and 1/2 (33). He had occasion to ask Respondent his clothes sizes and the clothes size Respondent gave him corresponded to the clothes he found in the car (33). In the glove box of the car, he found proof of insurance and a vehicle registration for the Toyota (33). Also in the glove box was a bill for a Motorola beeper which was in Respondent's name (34).

Sgt. McNamara was asked if he was aware of the price one could purchase approximately 800 grams of cocaine; he said he was and that the purchase price of such an amount of cocaine would be about $26,000 (35). He was then asked if he was aware how much profit could be made on the resale of that amount of cocaine; Sgt. McNamara responded that he was and that the profit would be between $50,000 and $70,000 (36).

On cross-examination, Sgt. McNamara testified that it was Detroit Police policy that anytime an amount in excess of 225 grams of narcotics was involved, either he or another sergeant from the Narcotics Section would go to the scene of the arrest (37). Also on cross, Sgt. McNamara testified that he found out that the Toyota was registered to one Leigh Harcourt (38). When asked if did any investigation as to how Respondent came into possession of the Toyota, Sgt. McNamara responded that he talked to Respondent about the vehicle (38). When asked if Respondent told him that the vehicle had come from B & B Car wash, where Respondent worked, Sgt. McNamara responded that Respondent never said anything about a car wash; what Respondent told him was that he had gotten the car from a friend (38). When he asked Respondent what the friend's name was, Respondent responded that the name of his friend was on the visor (38). He asked Respondent how long he had had the car and Respondent told him that the friend had given him the car the day before (38). He continued to talk to Respondent and Respondent, at that point, stated that he wanted an attorney (38). When asked why he did not contact Ms. Harcourt as to whether she knew anything about the cocaine in her car,

Sgt. McNamara indicated that he did not feel such an inquiry would be productive, since he felt that she would deny knowledge of the cocaine in any event (39).

On redirect examination, Sgt. McNamara testified that he asked Respondent about the beeper and he asked Respondent if he was employed; Respondent responded that he was unemployed (43). When he asked Respondent about his last job, Respondent told him that he had never been employed (43).

Respondent testified that he was 23 years old (Transcript, 6/21/95, 44). When asked if had been employed on January 11, 1994, Respondent responded that he had been doing little odd jobs back then (44). He testified that back then he had been washing cars and running errands for a car wash owner; the owner of the car wash, he said, was one Michael O'Neal Williams (45). He testified that the car wash was located at 2520 Grand River, right next to Cass Tech High School (45). He testified that he had known Mr. Williams all his life (45). He testified that as of January 11, 1994, he had been working at the car wash for four or five months (45). Respondent was asked if, as part of the errands or things he would do for Mr. Williams, selling drugs was part of it; Respondent responded that it was not. Nor did he ever receive drugs for Mr. Williams (45-46). He was asked if he knew a Leigh Harcourt; he responded that he did, that she was one of Mr. Williams' girlfriends (46). He testified that she had been the owner of the 1989 Toyota in question (46). He (Respondent) had wanted to buy the Toyota, and Mr. Williams had told him that if he was a good worker, he might get the car for little or nothing (46). Everybody who worked at the car wash had access to the Toyota; the Toyota was actually kept at the car wash (46).

He worked on January 11, 1994 (47). At about 9:00 a.m., he went to go pick up something at the Coney Island down the street on Grand River (47). Mr. Williams told him that he wanted him (Respondent) to go over to his (Mr. Williams') mother's house and check on it that morning

because the house had been broken into, stripped, and gutted (47). The house was on 15th Street and it was boarded up (47). The house had been boarded up for two or three years and he would go over there about once a month to check on it, at the request of Mr. Williams (48).

While he was on Myrtle Street, on his way over to the house on 15th Street, he did notice the police behind him (48). It seemed as if they were following him at first, but then he thought that they just wanted him to pull over so that they could get around him (48). He just kept going on Myrtle and then turned onto 15th Street (49). The police also turned onto 15th Street (49). When he got to 3557 15th, he pulled up into the driveway (49). He was not trying to elude the police or run from them (49). When the police came to a stop, after he pulled into the driveway, he proceeded to step out of the car he was driving and an officer came up and told him to step back into the car (49). He did what the officer told him to do and then the officer walked over towards him and told him to get out of the car and to go to the rear of the car (49-50). He did what the officer told him and the officer then asked him for his driver's license (50). He told the officer that he had never had a driver's license, which was a fact (50-51). When he told the officer that, the officer proceeded to search the Toyota while the other officer took custody of him (51). As the first officer proceeded to search the car, he (the officer) came up with a gray bag; the first officer then told the second officer to handcuff him (51). He did not know where the officer got the bag from, but he did see the officer come out of the car with the bag (51). He had never seen this gray bag before (51).

When he was transported to the police station, another officer, Sergeant McNamara, told him that a large quantity of cocaine had been found in the car (52). He had not known that there had been any cocaine in the car (52). After this incident, he no longer worked at the car wash because he and Williams "fell out" (52-53); he never visited that car wash

after that (53). He admitted having had a pager on his person when he was arrested; he also admitted that some of the clothing in the car had been his, like the Reebok shoes, but he denied that the "Billion Bay" coat belonged to him (53-54).

On cross-examination, Respondent was asked why he told Sgt. McNamara that he was unemployed; Respondent responded that when Sgt. McNamara told him that a large amount of drugs had been found in the car, he was probably hysterical (55). When asked if this caused him to forget that he was employed, Respondent responded that he hadn't known what to say; he had never been in this circumstance before and he hadn't known what the right thing to say was (55). When asked if he kept a beeper because of his employment with Mr. Williams, Respondent responded that the beeper had nothing to do with Mr. Williams, that it was for his own personal use (55). He testified that he kept it so that his lady friends could get in touch with him (56). He had paid $39 for the beeper and also paid a monthly fee to it (56). When asked if he paid for his own support with his job at the car wash, Respondent responded that he did, with the support of his brothers and sisters – they would all chip in and pay the bills (57). When asked if it got tight sometimes, Respondent responded that it did (57). When asked how he could afford a luxury item like a beeper when things were tight, Respondent responded that the beeper only cost him $10 per month to maintain (57). He denied that he kept a beeper so that Mr. Williams could get in touch with him so he could sell dope for Mr. Williams (57). He also denied that the house at 3557 15th Street was a house where he was selling dope for Mr. Williams (58).

Respondent testified that he had had the car four or five hours before he was arrested (58). When asked when he had put his clothing in the car, Respondent responded that his clothing had been in the car from the previous time he had used the car (58). He was asked if anyone else kept clothing

in the car; Respondent responded in the negative (59). He testified that the jacket belonged to Mike Williams (59).

With respect to when the police were following him, Respondent testified that the police never activated their lights, nor did they blow a loud horn (61). When asked why he told Sgt. McNamara that the car belonged to a friend instead of telling him that the car belonged to Leigh Harcourt, Respondent responded that he did not give the name of Leigh Harcourt because he had never been in trouble before and he did not know what to tell Sgt. McNamara; he never mentioned the name of Mike Williams to Sgt. McNamara either – Williams being the person who actually bought the car for his girlfriend, Leigh Harcourt (64). When asked if the reason he never gave the police the name of Mike Williams was because Williams was a big dope dealer he was working for, Respondent responded that this was not true; he stated:

> A No, I knew that obviously he had left something in the car and there were going to be repercussions behind it so I really didn't know what to do, sir.
>
> (64).

By "repercussions," he stated that he meant that he did not know if his life would be in danger or not (64). Respondent was asked if his reason for not giving the names of Mr. Williams or Ms. Harcourt was to protect them; he responded that his purpose in not giving the names was to protect himself (65). When asked why he had his clothes in the car, Respondent responded that he had been taking them to the cleaners; he stated that he took his jeans to the cleaners to have them pressed (68-69).

ii) Trial Court's Findings of Fact and Verdict

The trial court judge made the following findings of fact and rendered the following verdict:

> THE COURT: The Court has had the benefit of having heard the witnesses in this case and it had an opportunity to assess their veracity. The Defendant took the stand here and the Defendant is a big liar. I can't believe that Mr. Hutchinson would get on the stand and say, "I don't know what to say when someone arrests me, because I've never been arrested before." He says to the officer who stopped him that he wasn't employed – various other things that he said. It's just unbelievable.
>
> As far as possession with intent to deliver. The Court is not satisfied that that – deliver/manufacture, has been satisfied, but the Court does find the Defendant guilty of possession of 650 or more grams of a controlled substance; cocaine, contrary to the statute.

(Transcript, supra, p 94).

B) Evidentiary Hearing on Respondent's Motions for New Trial (Pertinent Testimony)

i) February 22, 2001

a) Testimony of Glenn McCandliss

Glenn McCandliss testified that he was appointed to represent Respondent when the prosecution appealed Judge Simmons' verdict of attempted possession of over 650 grams of cocaine (Motion Transcript, 02/22/01, 21). In the course

of representing Respondent, he undertook an investigation, and, in the course of that investigation, he had occasion to go to the B & B Car Wash where, according to the testimony at trial, Respondent had been employed (21); he went there in October of 2000 (22). His purpose in going there was to try and find one Michael Williams (22). He had prepared an affidavit he hoped Williams would sign wherein Williams would admit the drugs in the car Respondent was driving when he was arrested were Williams's drugs and that Respondent had no knowledge of the drugs being in the car (22-23).

He came into contact with Williams at the car wash and identified himself to Williams and asked Williams if he could ask him some questions (24). Williams acknowledged to him that he was aware that Respondent had been arrested in January of 1994 when he was pulled over in a car registered to his (Williams's) girlfriend (26).

McCandliss testified that he believed that Williams acknowledged that the drugs in his girlfriend's car were his drugs (26). He testified that he asked Williams if Respondent would have known that there were drugs in the car when he drove it back in January of 1994; Williams responded that Respondent would not have known about the drugs in the car and that Respondent had had nothing to do with it (26-27). As far as the affidavit he had prepared for Williams to sign, Williams looked the affidavit over and said he would sign it, if his lawyer said it was okay (27). McCandliss testified that he also asked Williams if he would agree to come to court to testify to what he had told him; Williams responded that he would, if his lawyer said it was okay – Williams's lawyer was Thaddeus Dean (27-28). McCandliss testified that he then left the proposed affidavit and his business card with Williams and asked Williams to call him (28). Williams's attorney, Thaddeus Dean, called him back the next day or the day after and told him that Williams would not be signing the affidavit, and would not be appearing in court to say that the drugs were his drugs (28).

On cross-examination, McCandliss testified that by the time he was appointed to represent Respondent, Williams had already been through the federal court system (29). He testified that his understanding was that Williams had been charged with major counts of drug distribution, conspiracy counts that came in 1995, almost 14 months after Respondent's arrest and conviction, and that he was later indicted for separate drug dealing offenses in 1995 which led to criminal proceedings in 1996 (30). He testified that he also understood that Williams entered into a Rule 11 Plea Agreement with the U.S. Government pertaining to these charges (30). He "kind of" got the impression from Williams, when he talked to Williams, that Williams had gotten his deal and that it was all over for Williams, such that he had nothing to lose by saying that the drugs were his and that Respondent knew nothing about the drugs (31).

McCandliss also testified on cross-examination that he knew of Williams's existence when he was appointed to represent Respondent; he knew this because he had read the trial transcript (37-38). He testified that he knew from reading the trial transcript that it was Respondent's testimony at trial that the car he had been driving had belonged to Williams's girlfriend (38-39). When asked why he had not gone to talk to Williams when he was first appointed to represent Respondent in the prosecution's appeal five years previously, McCandliss responded that he had not been appointed to bring a motion for new trial based on newly discovered but rather to answer the prosecution's appeal (40). McCandliss then acknowledged that after the prosecution's appeal, when the case was remanded to the trial court for resentencing, he did file a motion for new trial but did not include this as a ground in that motion (41). He acknowledged that there was no reason why he could not have talked to Williams before he filed the new trial motion in front of Judge Simmons (42).

On redirect examination, McCandliss testified that he had occasion to go to the United States District Court for the

Eastern District and pull records from the file pertaining to the federal prosecution of Michael Williams; McCandliss was then shown four documents (42-44). He identified Respondent's Exhibit 4 as a criminal complaint and affidavit filed in the United States District Court for the Eastern District, which alleged that as a result of the execution of search warrants at Williams's car wash and home on February 17, 1995, a quantity of cocaine was discovered, and that, as a result of that, Williams was charged with possession with intent to distribute the cocaine found; according to the affidavit attached to the criminal complaint, two kilograms of white powder were found at Williams's house and 500 grams of white powder were found at the car wash (44-45). McCandliss testified that it was his understanding that the criminal complaint against Williams was subsequently dismissed (42). McCandliss then identified Respondent's Exhibit No. 3 as the Rule 11 Plea Agreement between Williams and the U.S. Government dated June 26, 1997, wherein Williams agreed to provide extensive cooperation to the federal authorities in exchange for his being able to plead guilty to some sort of federal misdemeanor of filing a false return (45). McCandliss identified Respondent's Exhibit No. 5 as the Information filed in accordance with the Rule 11 Agreement; the charge in the Information was filing a false or fraudulent return (46). McCandliss identified Respondent 's Exhibit No. 6 as the judgment of conviction and sentence, in which Williams received a term of imprisonment of six months in a community correction center with work release (46-47).

b) Testimony of Thaddeus Dean

The last witness called by Respondent on February 22, 2001 was attorney Thaddeus Dean. He testified that he had been an attorney for 21 years and that for the past ten of those years he had represented Michael Williams in various matters (Motion Transcript, 02/22/01, 59). He testified that the time

period he represented Williams had included February of 1994 (59). Dean testified that it was in February of 1994 that he came to represent Respondent as well; his representation of Respondent was in connection with Respondent's arrest in February of 1994 for possession with intent to deliver over 700 grams of cocaine (59). How he came to represent Respondent was that he got a call from Michael Williams; Williams indicated to him that Respondent had been arrested and Williams asked him to go and see if he could find out what was going on (59-60). By the time he got downtown, Respondent had been taken to court for arraignment; he then represented Respondent at the arraignment (60). Williams paid his retainer for his representation of Respondent (60).

In between Respondent's arrest in February of 1994 and his trial on June 21, 1995, Williams got arrested by the federal authorities (60-61). Dean testified, referring to Respondent's Exhibit No. 4, that in fact it was on February 17, 1995 that Williams was visited by federal authorities armed with a search warrant; the authorities found Williams in possession of several kilos of cocaine, which led to his being charged in a criminal complaint in federal court with possession with intent to deliver cocaine (61). Dean acknowledged that a criminal complaint in federal court was customarily dismissed after a certain amount of time with a view towards grand jury indictment, because under federal law, a defendant had the right to be charged by grand jury indictment (62). So it was with Williams's case, and, when the criminal complaint was dismissed, he entered into negotiations with the federal authorities in an attempt to resolve Williams's problems with them (62). Williams agreed to cooperate with the authorities and hopefully furnish them with useful information in exchange for his being allowed to plead guilty to furnishing or aiding and abetting in the preparation of a false and fraudulent tax return, for which he was ultimately sentenced to six months in a halfway house (63).

Dean testified that at the time he represented Respondent, he was at all times representing Williams, and so he felt he had a duty to protect Williams's interests (63-64). When asked if this duty and loyalty to Williams kept him from doing anything on behalf of Respondent, Dean responded that it did (64). He testified that he never suggested to Respondent, as he had done for Williams, that Respondent become an informant, witness, or operative against Williams toward a possible resolution of the charge against Respondent (64). Nor did he ever approach state or federal prosecutors and ask if it were possible for Respondent to become an informant against Williams (64). Dean testified that between the time of Respondent's arrest and the time of Williams's arrest by the federal authorities, he knew that there was an ongoing federal investigation of Williams as far as drug trafficking (65). He testified that had he not felt a duty to Williams, it would have been appropriate for him to approach the state authorities or at least the federal authorities to see if he could gain some leniency for Respondent as a result of his possible help in their investigation of Williams (65).

Dean acknowledged that Respondent's defense at trial had been that he didn't know anything about drug trafficking at Williams's car wash; he was asked how Respondent could then have done himself any good as far as supplying information to the authorities about Williams (65-66). Dean responded that Respondent was close enough to Williams that he could have worn a body mike (microphone) and recorded his conversations with Williams or taped telephone conversations he had with Williams or put his ear up against Williams's office door (66-67).

Dean testified that sometime in the year 2000, he received information from Williams that Williams had had a conversation with one Glenn McCandliss (67). He talked to McCandliss and told McCandliss that he could not recommend to Williams that Williams sign the affidavit which McCandliss had presented to Williams; it was his

opinion that this would be a confession of drug trafficking (67-68). When he talked to Williams, Williams asked him about his immunity status; he told Williams that he did not think Williams's immunity status would cover what was contained in McCandliss's affidavit (68).

On cross-examination, Dean acknowledged that Respondent's testimony at the waiver trial was that he knew nothing about the drugs in the car and that he had been working for Michael Williams and he was driving Williams's girlfriend's car, the car in which the drugs were found, suggesting that it must have been either Williams or his girlfriend who had put the drugs in the car (74-75). Dean acknowledged that he had no problem presenting this defense, or at least did not talk Respondent out of testifying to this, and so his representation of Respondent at trial would not have been different had he not also been representing Williams (75). He testified that in fact he encouraged Respondent not to hold anything back about Williams (76). Dean testified that at the time of trial, there was no possible conflict of interest by his representing both Respondent and Williams because by the time of Respondent's trial, Williams had already been indicted by the federal authorities (76).

Also on cross, Dean was asked if it would have been likely that Respondent could go to Williams and ask him about the dope which was left in the car and that would not be at all suspicious; Dean responded that the relationship between Respondent and Williams was such that Williams would probably not have been suspicious (78-79). Dean was asked if this was so even though Respondent had been charged and Williams knew Respondent had been charged and even though Williams knew that Williams himself was under investigation by the federal authorities; Dean responded that Williams was a fairly reckless individual (79-80). When asked if he thought the Wayne County Prosecutor's Office or the federal authorities would have had misgivings about using Respondent as an informant against Williams when Respondent was claiming that he had nothing to do with the

drugs, Dean responded that the government's misgivings would not have prevented Respondent from being able to get information which would have been of interest; Dean did acknowledge, however, that this was pure speculation (82).

On redirect examination, Dean testified that nothing Respondent testified to at trial about Williams could have hurt Williams, because by the time of Respondent's trial, Williams was already cooperating with the federal authorities (83).

ii) March 30, 2001

a) Testimony of Michael Williams

On this date, Michael Williams appeared in court with his attorney Thaddeus Dean; Dean positioned himself behind Williams when Williams was called to the stand by Respondent (Motion Transcript, 03/30/01, 4).

On questioning by Respondent, Williams was asked if he was familiar with a 1989 black Toyota; Williams pled the Fifth [Amendment] (5). When asked if he was familiar with cocaine found in a 1989 black Toyota, Williams pled the Fifth (5). When asked if the cocaine found in the 1989 black Toyota belonged to him, Williams pled the Fifth (5). When asked if he was aware that arising out the cocaine found in the 1989 black Toyota, Respondent was charged with possession of that cocaine, Williams pled the Fifth (5). When asked if it was his intention to continue pleading the Fifth as to any and all questions about the cocaine found in the 1989 black Toyota, Williams responded that it was (5-6).

On cross-examination, Williams was asked if he ever met an attorney named McCandliss; Williams pled the Fifth (6). The prosecutor objected to Williams's taking the Fifth as to this question because the answer would not incriminate Williams and the answer could be relevant to McCandliss's credibility; Williams was allowed to plead the Fifth (6-7).

iii) April 11, 2001

a) Testimony of Respondent

The only witness called by Respondent on April 11, 2001, and the final witness called in this evidentiary hearing, was Respondent himself. He testified that at the waiver trial in this case, he had testified that the black Toyota that he was driving and from which the police seized cocaine, belonged to the girlfriend of Michael Williams (Motion Transcript, 04/11/01, 4-5). He acknowledged testifying at his trial that he had been working in the car wash owned by Williams when he was arrested and that the Toyota he was driving when he was arrested used to be driven by various people who worked at the car wash (5). At the waiver trial, he had testified that he didn't know the cocaine was in the car (6).

Respondent testified that after he was arrested, he was allowed to make a phone call and the person he called was Michael Williams (5-6). He called Williams because something had apparently been found by the police in the car and he told Williams that whatever it was did not belong to him and that he now had a problem about it (6). When asked why he called Williams as opposed to anyone else, Respondent responded that Williams was the only person he knew who could help him out if something like this occurred (6). He spoke to Williams on the phone from the police station and Williams apologized about what had taken place and told him not to say anything and that he would have an attorney come down (6). The attorney, Thaddeus Dean, did not show up at the police station, but he did appear at the arraignment (6-7). He never paid the attorney any money; rather, he found out later that Williams had paid Dean (7-8). During the course of Dean's representation of him, Dean never afforded him an opportunity to cooperate with the police against Williams (8). Dean just told him that their best chance of winning the case was to have a bench trial (8). If Dean had suggested cooperating with the police in return

for a lesser charge or even a dismissal, he would have done it, including wearing a microphone or wire to record conversations with Williams and tape recording telephone conversations with him (9).

Respondent testified that at his waiver trial he had testified that he was unaware, when he was working at the car wash, that Williams was involved in cocaine; from what he knew Williams did not deal in cocaine (9). It was when he was arrested with two kilos of cocaine in the car that his opinion of Williams as to whether Williams was involved with cocaine changed (9). He felt that Williams was responsible for the cocaine being in the car (9). When asked if he thought Williams would have been willing to talk to him about the cocaine, Respondent responded that he was sure he would have (10).

Respondent testified that he allowed Dean to represent him because he could not afford legal assistance and his understanding was that court–appointed attorneys did not do a good job (10).

On cross-examination, Respondent was asked if he ever suggested to Dean that he approach the police or prosecution and offer set up a deal to set up Williams and show that he was the dope dealer and not him; Respondent responded that he did not (14). When asked if he ever thought about suggesting that to Dean, Respondent responded that he did think about it, but just let Dean plot out the case (15). Respondent was asked if his position was that even though he knew nothing about dope and even though he did not deal dope himself he would have been willing to approach Williams to talk about dope; Respondent responded that that was his position (15-16). Respondent was asked if it made sense to him that Williams, knowing that he (Respondent) had been arrested for drugs, would talk to him about drugs and not suspect that he was trying to set him up; Respondent responded that it did (23-24).

On recross-examination, Respondent was asked if he was out on bond before his trial; he responded that he was

(26). He was asked if he went and talked to Michael Williams after he made bond about what was in the car; Respondent responded that he did not, because he did not feel it would have been in his best interests (27).

REASONS FOR GRANTING THE WRIT

Ineffective assistance of counsel based on a conflict of interest claim requires a showing of an actual conflict of interest that adversely affected counsel's performance, but does not require the showing of prejudice required by *Strickland v. Washington*.[2] There is a split in federal circuits as to whether adverse effect can be shown without a demonstration that an alternative strategy not followed would have been objectively reasonable under the circumstances, and the Michigan Court of Appeals has followed those circuits holding that no showing of objective reasonableness is required. This Court should grant certiorari to resolve this conflict in circuits on this important question.

A) The Law Pertaining to Conflict of Interest Claims

Michigan follows federal law, particularly *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). *People v. Smith*, 456 Mich. 543, 556-558, 581 N.W.2d 654 (1998). Under *Cuyler*, a defendant who does not object to a potential conflict of interest at trial must

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[2] 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984).

establish that an actual conflict of interest adversely affected his lawyer's affected his lawyer's performance. 446 U.S. at 348, 100 S.Ct. at 1718. Here, Respondent did not object to the potential conflict of interest at trial, even though he knew that Michael Williams had hired Thaddeus Dean to represent him on this charge.

i) The Conflict in the Federal Circuits

There is an apparent split in the Federal Courts of Appeal over the meaning or practical application of the above test, and in this case, the Michigan Court of Appeals elected to follow one line of cases over another, which, Petitioner believes, was decisive in reaching its conclusion.

The Fourth Circuit has stated that there is a three-part standard for showing an adverse effect. First, the defendant must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the defendant must show that the alternative strategy or tactic was *objectively reasonable under the facts of the case* known to the attorney at the time of the attorney's tactical decision. Finally, the defendant must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict. *Mickens v. Taylor,* 240 F.3d 348, 361 (4th Cir. 2001), *affirmed,* 535 U.S. 162, 122 S.Ct.1237, 152 L.Ed.2d 291 (2002). In a like vein, the Eleventh Circuit has stated that the defendant must demonstrate that the alternative strategy or tactic was reasonable under the facts. *United States v. Novaton,* 271 F.3d 968, 1011 (11th Cir. 2001), *cert. denied,* – U.S. –, 122 S.Ct. 2345, 153 L.Ed.2d 173 (2002).

On the other hand, the Second Circuit has stated that the test does *not* require a defendant to show that the alternative strategy or tactic not adopted by a conflicted counsel was reasonable. *United States v. Malpiedi,* 62 F.3d 465, 469 (2nd Cir. 1995).

ii) The Court of Appeals Decision

In this case, the Court of Appeals stated as follows:

> Contrary to the prosecution's argument, this test does not require defendant to show that the alternative tactic not pursued by conflicted counsel was reasonable or that it affected the outcome of the trial.

(Court of Appeals Opinion, **Appendix B**, 4).

As can be seen, the Court was following that line of cases that do not require a showing that an alternative strategy or tactic would have been reasonable under the facts; indeed, it specifically cited *United States v. Malpiedi, supra.* The Court did not acknowledge that there was a line of cases that held otherwise.

iii) Petitioner's Position

Petitioner believes the standard requiring a showing of a failure to follow an *objectively reasonable* alternative strategy or tactic is the better view. While it is true that the prejudice prong of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984), is inapplicable in a conflict of interest case, that is, where a defendant shows that his counsel actively represented conflicting interests, a showing of defective performance (the first prong of *Strickland*) is still required. *Mickens v Taylor,* 535 U.S. 162, 122 S.Ct.1237, 152 L.Ed.2d 291 (2002). *Strickland* speaks of reviewing an attorney's performance from an *objective standard of reasonableness. Strickland, supra,* 466 U.S. at 688, 104 S.Ct.at 2064. Thus, the view espoused by Petitioner is more in tune with *Strickland* than the other view.

Applying the standard requiring a showing that an alternative strategy or tactic would have been objectively

reasonable under the facts, a different result than that reached by the Michigan Court of Appeals would have ensued.

Respondent's conflict of interest claim did not pertain to anything that occurred at the waiver trial; it is, rather, that Thaddeus Dean's representation of Michael Williams prevented Dean from suggesting to Respondent that he gain information for the police or the federal authorities about Williams's drug business, by having Respondent perhaps engage Williams in conversation about his drug business while wearing a wire or over a bugged telephone, in exchange for a reduction or possible dismissal of the charges against Respondent.

Apart from the fact that Respondent's claim was made long after the event of the dual representation, and that Respondent never made this claim in his first Motion for New Trial, which itself would have been a basis for denying Respondent's present motion for new trial, see *United States v. Reed*, 179 F.3d 622, 625-626 (8th Cir. 1999), there is no assurance that any police agency would have enlisted Respondent's "help" in this regard. What must be remembered is that when Respondent was arrested, he told the police that he was unemployed and had never been employed. Why then would the police think Respondent had any information to provide as to one Michael Williams, who Respondent had never worked for? The first mention of Williams was at Respondent's waiver trial. Furthermore, Respondent's testimony at the waiver trial indicated that he had no knowledge of any drug business being conducted by Williams. Why then would the police think that Respondent could supply any information of Williams's drug business; that is, why would Williams just, out of the blue, talk to Respondent about his drug business when Respondent knew nothing about any drug business being conducted by Williams? An abstract or hypothetical set of "what ifs" does not satisfy a defendant's burden in proving an actual conflict of interest. *Id.*, 179 F.3d at 625; see also *Beets v. Collins*, 986 F.2d 1478, 1486 (5th Cir.1993) (a theoretical or

merely speculative conflict of interest will not invoke the protections of the Sixth Amendment).

Second, from an objective standpoint, there was good reason not to suggest to Respondent that he try to provide information about Williams, which had nothing to do with the fact that Dean was also representing Williams. Had Respondent supplied information about Williams, Williams might have been antagonized enough to give the police more information about Respondent and what his involvement was in Williams's drug business. See e.g. *Carey v. United States,* 50 F.3d 1097, 1100 (1st Cir.1995).

Third, Respondent had to show that what he argued that Dean should have suggested to Respondent, that he engage Williams in conversation about his drug business and tape him or relay the conversion by way of a wire, would have been *reasonable* under the facts of this case. Respondent did not make this showing. It is rather inconceivable that Williams would have engaged in conversation about his drug business with Respondent, a person Williams knew had just been arrested by the police for possessing drugs which Respondent claims were Williams's drugs.

Fourth, Respondent's testimony at the evidentiary hearing that he would have been willing to wear a wire and engage Williams in conversations about his drug business was simply contrary to what Respondent testified to at the waiver trial. At the waiver trial, Respondent testified that after his arrest, he quit working at the car wash because he and Williams had a falling out (Waiver Trial Transcript, 06/21/95, 52-53). How would Respondent have gotten Williams into his confidence in light of the falling-out? And, in any event, wouldn't Williams have been just a little suspicious of Respondent all of a sudden patching up their falling-out to talk about drugs?

Furthermore, Respondent suggested at the waiver trial that if he would have given the police Williams's name or Williams's girlfriend's name, his life could have been in

danger, and so, in order to protect himself, he did not give them the names (Transcript, 06/21/95, 64). If Respondent was truly apprehensive about danger befalling him from Williams's way, it seems unlikely that he would have been willing to take the chance of wearing a wire to record a conversation with Williams about Williams's drug business and possibly being discovered doing it.

Finally, while Mr. Dean's multiple representation of both Respondent and Michael Williams appears to be a violation of Michigan Rules of Professional Conduct, a violation of a state ethical canon or disciplinary rule does not necessarily establish a violation of the Sixth Amendment. *Beets v. Collins, supra,* 986 F.2d at 1485; *United States v. Gambino,* 864 F.2d 1064, 1072 (3rd Cir. 1989). Such is the case here.

RELIEF

Wherefore, Petitioner respectfully requests that this Honorable Court grant certiorari in this matter.

Michael E. Duggan
Wayne County
Prosecuting Attorney

*Timothy A. Baughman
Chief of Research,
Training, & Appeals

Thomas M. Chambers
Assistant Prosecuting Attorney
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: 313-833-4596

*Counsel of Record
Dated:

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

People of the State of Michigan,
Plaintiff

vs

Case No: 94-001010
Hon. Carole F. Youngblood

SHAWN DEON HUTCHINSON,
Defendant.
_____/

OPINION AND ORDER GRANTING
DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said court held in the Frank Murphy Hall of Justice, City of Detroit, County of Wayne,
Michigan, on November 13, 2001 .

PRESENT: HONORABLE Carole F. Youngblood
Circuit Court Judge

This matter is before the court on the defendant's motion for new trial based on ineffective assistance of counsel and newly discovered evidence.

Procedural History

This case has a long and tortured history. The defendant was charged with possession with intent to deliver more than 650 grams of cocaine in violation of MCL 333.7401(2)(a)(i); MSA 14.15(7401(2)(a)(i). Michael Williams, the defendant's employer, hired Thaddeous (sic) Dean to represent the defendant. The defendant was

convicted in a waiver trial before the Hon. Louis F. Simmons of possession of more than 650 grams of cocaine on June 21, 1995. The sentencing date was scheduled for July 13, 1995 but adjourned a total of six times to April 1,1996. On that date Judge Simmons stated that he believed he had, and he intended to, find the defendant guilty of attempted possession of cocaine and adjourned the sentencing to April 26, 1996. On that date he sentencing the defendant to a minimum of 40 and a maximum of 60 months imprisonment.

The prosecutor appealed. On July 22, 1997 the Court of Appeals reversed Judge Simmon's correction of the verdict and remanded the defendant for resentencing. People v Hutchinson, 224 Mich App 663 (1997). The Supreme Court denied the defendant's application for leave to appeal. 456 Mich 956 (1998). Defendant's Motion for Reconsideration was denied on May 28, 1998.

On remand defendant filed a Motion for New Trail. Judge Simmons granted the motion for new trial on July 24, 1998 and set a trail date of August 17, 1998. The prosecutor appealed. The Court of appeals reversed the grant of Judge Simmons motion for new trial and remanded for entry of the verdict of possession of more than 650 grams of cocaine and resentencing before a new judge.[1]

The defendant then filed a Motion for New Trial and Amended Motion for New Trial in this court. This court granted an evidentiary hearing which was held on February 22, 2001, March 30, 2001 and April 11, 2001. Counsel for both parties were then permitted to file briefs. The time for filing these briefs was extended at the request of both counsel.

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[1] The Court of Appeals denied the defendant's Motion for Rehearing on November 4, 1999. The Supreme court denied the defendant's Application for Leave to Appeal on July 18, 2000. On September 26, 2000 the supreme court denied the defendant's Motion for Reconsideration.

Statement of Facts

Trial. At trial the police officers testified that they observed the defendant driving a 1989 black Toyota and he failed to stop at a stop sign. They followed him for several blocks and activated their lights. Defendant eventually stopped by pulling the car into a driveway. Defendant did not produce a driver's license when asked for one and he was placed under arrest on January 11, 1994. Officer Robert Kane observed a shirt-size, gray plastic bag under the driver's side seat. He retrieved the bag and found inside 11 clear plastic bags of cocaine which weighed at total of 794.7 grams. When the defendant was searched he possessed only a beeper and few dollars in cash.

A waist coat, blue undershirt, black jeans and tennis shoes were found in the car. The defendant admitted that the undershirt, jeans and tennis shoes were his and he testified that the waist coat belonged to Michael O'Neal Williams. The car also contained a proof of insurance and vehicle registration belonging to Ms. Harcourt and a receipt for the beeper possessed by the defendant.

The police testified the 1989 Toyota was registered to Leigh Harcourt who lived in Southfield. The did not contact Ms. Harcourt concerning how defendant came into possession of the car or question her about the cocaine.

The defendant testified that the was 23-years-old and he supported himself by doing odd jobs. He had known Michael O'Neal Williams all his life and Mr. Williams owned the B & B Car Wash on 2520 Grand River. He had worked for Mr. Williams for the four or five months prior to his arrest washing cars and running errands. He testified he had never received any drugs from Mr. Williams' girlfriends and she owned the Toyota. He testified that the Toyota was kept at the car wash and everyone who worked there drove the car.

On January 11, 1974 Mr. Williams told him to take

the Toyota an drive over to Mr. Williams' mother house to check on it because it had been vacant for two or three years and was boarded up. Mr. Williams believed that someone had broken into it. He was on his way to his house when the police stopped him. He testified he failed to stop for the police immediately because he did not understand they directing him to stop. He testified he has never had a driver's license. He was then arrested and the police found the cocaine in the car. He denied any knowledge about the cocaine and testified he had never been in any trouble before. He testified the pager was his own personal use. The defendant was found guilty of possession of cocaine.

Evidentiary Hearing. Glenn McCandliss testified that he was the defendant's appointed counsel after his conviction. Mr. McCandliss testified that in October, 2000 he went to the B & B Car Wash and met Michael Williams. Mr. Williams told him that Shawn Hutchinson knew nothing about the drugs that were in his girlfriend's 1989 Toyota, that the defendant had nothing to do with those drugs, and hat Mr. Williams said the drugs. Mr. McCandliss gave Mr. Williams an affidavit and he would so testify in court if his attorney, Thaddeous Dean, said it was all right for him to sign the affidavit.

Mr. McCandliss further testified that a day ot two later Thaddeous Dean telephoned him and told him he represented Mr. Williams and that Mr. Williams would not sign the affidavit or testify in court.

Mr. McCandliss testified that he learned through federal court documents that a search warrant was executed on Mr. Williams' home and he B & B Car Wash on February 27, 1995 and 2,000 grams of cocaine were found in his house and 500 grams of cocaine was found at the car wash. Mr. Williams subsequently pled guilty to a misdemeanor in a Rule 11 Plea Agreement wherein he agreed to cooperated with the federal authorities. Mr. Williams sentence was six months in a community correction center on work release.

Next, Fatima Shabazz testified that she worked at the hair salon next to the car wash in 1994 and that she knew the defendant and Mr. Williams. She stated the defendant worked at the car wash, that she and the defendant socialized, and that the defendant never had any large sums of money. She was available to testify at the defendant's trial bu no one ever contacted here.

Thaddeous Dean testified that he has represented Michael Williams for the last 10 years, or from approximately 1991. He stated that when Mr. Hutchinson was arrested in January, 1994 that Mr. Williams retained him to represent Mr. Hutchinson and he did so while he contained to represent Mr. Williams. He continued to represent the defendant through his trial on June 21, 1995 and sentencing on April 26, 1996.

At the same time Mr. Dean continued to represent Mr. Williams on various matters including his arrest and indictment in federal court as a result of the 2,500 grams of cocaine that were found in Mr. Williams house and business on February 17, 1995. Mr. Dean negotiated Mr. Williams Rule 11 Plea Agreement in federal court.

Mr. Dean testified that his representation of Mr. Williams did keep him from doing things on behalf of Mr. Hutchinson that he would have otherwise done, such as negotiate with state and federal prosecutors for Mr. Hutchinson to become an informant and witness against Williams in exchange for leniency. He testified he wold have done so if he had not represented Mr. Williams. He testified that he believe Mr. Hutchinson would have been an effective informant because he had known Michael Williams his whole life and Mr. Williams was reckless and would talk to Mr. Hutchinson.

Mr. Dean testified that he did not believe his duel representation of the defendant and Mr. Williams effect his actual representation of Mr. Hutchinson at trial because Mr. Williams had already been indicted. Further, Mr. Dean

testified that he had gone to the authorities and had Mr. Hutchinson cooperated with them that he believes it is likely that Mr. Hutchinson could have gotten evidence to prove his innocence.

Michael Williams took the stand but only testified to his name. To all other questions he declined to answer and asserted the Fifth Amendment.

Shawn Hutchinson testified that he called Michael Williams when he was arrested and Mr. Williams apologized and said he would send an attorney. Mr. Dean appeared at the arraignment and represented him thereafter. Mr. Dean never suggested that he cooperate with the police or prosecutors but, if he had made that suggestion, he would have cooperated in any way.

Legal Analysis

A. Ineffective assistance of Counsel based on actual conflict of interest.

Shawn Hutchinson asserts that his Sixth Amendment rights were violated because Thaddeous Dean's duel representation of him and Michael Williams, the true owner of the drugs, created an actual conflict of interest.

Under both the United States and Michigan Constitutions every defendant has the right to effective assistance of counsel and the undivided loyalty of his attorney. Strickland v Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984); Holloway v United States, 435, 55 L Ed 2d 426, 98 S Ct 1173 (1978); Glasser v United States, 315 US 60, 86 L Ed 2d 680, 62 S Ct 457 (1942); Hall v United States, 200 F3d 962 (6th Cir,2000); People v Gallagher, 116 Mich App 283 (1982).

A Claim of ineffective assistance of counsel is analyzed by the court applying a two-pronged test.

Strickland, supra; People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994); People v Rhinehart, 149 Mich App 172 (1986). A defendant must show (1) his counsel's performance was deficient, and (2) this performance prejudiced the defense depriving the defendant of a fair trial. Strickland, supra; Hall, 200 F3d at 965.

When the claim is based on an actual conflict of interest, the standard is different. Hall, supra; Rhinehart, supra; People v Simmons, 134 Mich app 779, 788, 352 NW2d 275 (1984). When an actual conflict of interest exists, prejudice is presumed. Hall, supra. Where it is demonstrated that an attorney made a choice which was helpful to one client and harmful to the other, an actual conflict of interest is demonstrated. United States v Mers, 701 F2d 1321, 1328 (11th Cir, 1983).

The prosecution's argument that the defendant's failure to object to the conflict of interest at trial requires him to establish that the actual conflict of interest adversely affected his defense is without merit. There is no evidence that the defendant had any knowledge that a conflict of interest existed or that he had any reason to suspect such a conflict. In addition, the defendant has clearly demonstrated that Mr. Dean's disloyalty and breach of his duties did affect his defense.

Here an actual conflict of interest did exist based on Mr. Dean's representation of the defendant and Michael Williams at the same time and over the same subject matter. Mr. Dean admitted that this representation of Mr. Hutchinson was compromised based on his representation of Mr. Williams. He admitted that he failed to pursue negotiations with the prosecutor based on his representation of Mr. Williams.

Mr. Dean had represented Michael Williams prior to the date of the defendant's arrest on drug related matters. Mr. Dean knew that there was a pending federal investigation of

Michael Williams for drug trafficking while he was representing Mr. Hutchinson. Mr. Dean knew that the drugs which Mr. Hutchinson was charged with processing were found in Mr. Williams' car. Mr. Dean knew that the defendant was driving that the drugs found in that car belonged to Mr. Williams and that Mr. Hutchinson was actually innocent.

Mr. Dean failed to bring forth any of this information at Mr. Hutchinson's trial. He failed to call witnesses that could corroborate that Mr. Williams' owned the car, that the defendant worked at the car wash doing only car-wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that MR. Hutchinson was a person who lived paycheck-to-paycheck and was not associated with any drug-related activities. Clearly Mr. Dean failed to call such witnesses and put forth such information about Mr. Williams because Mr. Williams was his client and paying for Mr. Hutchinson's defense.

It is difficult to imagine a clearer conflict of interest. The interests of Mr. Hutchinson and Mr. Williams could not have been more in conflict. This court is not aware of a more obvious and extreme example of an actual conflict of interest. Cuyler v Sullivan, 446 US 335, 350 (1980); United States v Christakis, 238 F.3d 1164, 1170-71 (9th Cir. 2001).

Once a defendant shows an actual conflict of interest, he need not demonstrate actual prejudice. Cuyler v Sullivan, supra; Mickens v Taylor, 227 F.3d 203, 219 (4th Cir, 2000). However, here the defendant has shown substantial and real prejudice. Mr. Dean breached his most basic duty of loyalty to Mr. Hutchinson and continued throughout his pretrial failure to negotiate on behalf of Mr. Hutchinson and his failure to provide Mr. Hutchinson with an adequae defense at trial.

B. Newly discovered evidence.

A motion for new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is note merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. People v Lester, 232 Mich App 262, 271 (1998).

The newly discovered statements were made by Michael Williams to attorney Glenn McCandliss. Mr. McCandliss previously represented Mr. Hutchinson on appeal. The details of Mr. Williams statements to Mr. McCandliss are set forth in the record of the evidentiary hearing. In essence Mr. Williams told Mr. McCandliss that Mr. Hutchinson did not know of the existence of the drugs in the Toyota vehicle Mr. Hutchinson was driving in January, 1999. Mr. Williams acknowledged that the drugs belonged to him. If ordered at trial, Mr. Williams' statement would be admissible as statements against interest. MRE 804(b)(3).

Mr. Williams' statements incriminate him in a real and tangible way. He asserted actual ownership and possession of the drugs. These statements are against his penal interest. Not only do these statement exculpate Mr. Hutchinson, they assert Mr. Williams' own culpability. People v Barrera, 451 Mich 261, 270-272 (1996).

Further, any reasonable person in Mr. Williams' situation would have known that the statements implicated him. MRE 804(b)(3). Mr. Williams has substantial experience in the both the state and federal courts in the state and obviously knew his rights in the trial court when he took the stand and asserted his Fifth Amendment right repeatedly.

Finally, the circumstances surrounding the statement indicate the trustworthiness of the statement. Mr. Williams knew the particulars surrounding the seizure of the drugs, including where and when they were found. The statements

were not made to law enforcement officers, while the defendant was incarcerated, or to curry favor. Mr. Williams had no reason to lie and the statements did not shift the blame from him to someone else. Mr. Williams apologized to Mr. Hutchinson after Mr. Hutchinson was arrested. Mr. Williams statements are completely consistent with the defendant's testimony at trial and at the evidentiary hearing.

The defendant has a constitutional right to produce exculpatory evidence and this right limits the threshold of corroborating circumstances that a court may require him to produce to permit admissibility. Barrera, supra. Here the standards of corroboration have been met.

This evidence clearly meets te four-pronged test set forth in Lester, supra. The statements did not exist until Mr. McCandliss talked to Mr. Williams during the course of the arguments before this court on this motion. The evidence is not cumulative. No one at trial testified as to the true ownership of the drugs. The admissions of Mr. Williams are likely to cause a different result in the outcome of any future trial. Finally, the defendant could not have discovered this evidence earlier because the statements did not exist. The defendant had not reason to even suspect that Mr. Williams would admit his own inculpatory behavior during the course of this litigation.

Based on all the reasons set forth above, the defendant's motion for new trial is granted based both on ineffective assistance of counsel and newly discovered evidence.

Carole F. Youngblood
Circuit Court Judge

Dated: November 13, 2001

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF WAYNE

People of the State of Michigan,
Plaintiff,

vs

Case No: 94-001010
Hon. Carole F. Youngblood

SHAWN DEON HUTCHINSON,
Defendant.
_____/

ORDER GRANTING
DEFENDANT'S MOTION FOR NEW TRIAL

At a session of said court held in the Frank Murphy Hall of Justice, City of Detroit, County of Wayne,
Michigan, on November 13, 2001

PRESENT: HONORABLE Carolee F. Youngblood
Circuit Court Judge

This matter having come before the court on the defendant's Motion for new Trial, evidentiary hearings, having been held, briefs having been filed, and oral arguments having been heard, and the court being duly advised in the premises and after due consideration:

IT IS HEREBY ORDERED that the defendant's motion fore new trial is granted on the basis of ineffective assistance of counsel and newly discovered evidence and for the reasons set forth in the attached opinion.

Carole F. Youngblood
Circuit Court Judge

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Unpublished
August 23, 2002

v

No. 238027
Wayne County Circuit
LC No. 94-001010

SHAWN DEON HUTCHINSON
Defendant-Appellee.

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.
PER CURIAM.

Defendant was originally charged with possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i). Following a bench trial, defendant was convicted of possession of 650 grams or more of cocaine, MCL 333.7403(2)(a)(i). However, at the sentencing hearing that took place more than ten months after the trial due to several adjournments at defendant's request, the trial court sua sponte concluded that it had intended to convict defendant of attempted possession of 650 grams or more of cocaine, rather than actual possession. Accordingly, the trial court sentenced defendant to a term of forty to sixty months' imprisonment.

The prosecutor appealed, and this Court reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing.[1] On remand to the trial court, defendant filed a

[1] *People v Hutchinson*, 224 Mich App 603; 569 NW2d 858 (1997).

motion for a new trial.. The trial court granted the motion on the basis that a miscarriage of justice had occurred. The prosecutor appealed, and this Court again reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine. However, resentencing was ordered to be before a different circuit court judge.[2]

On remand, the case was reassigned to a different judge and defendant filed an amended motion for a new trial, this time on the basis of (1) ineffective assistance of trial counsel on the grounds of conflict of interest, and (2) newly discovered evidence related to a post-trial statement allegedly made by defendant's employer. After an evidentiary hearing, the circuit court granted the motion in a written opinion and order. From this order, the prosecutor was granted leave to appeal. We affirm in part, reverse in part, and remand for a new trial.

I. Ineffective Assistance of Counsel[3]

The prosecutor first argues that the circuit court incorrectly concluded that an actual conflict of interest on the part of defendant's trial counsel adversely affected his

---

[2] *People v Hutchinson*, unpublished opinion per curiam of the Court of Appeals, issued July 13, 199 (Docket No. 213289).

[3] Initially, we note that the prosecution briefly raises the argument that because defendant failed to raise the conflict of interest in his first motion for a new trial, his present emotion for anew trial should have been denied. However, the prosecution has not properly presented this issue in its statement of questions presented, nor has it been properly briefed having been given cursory treatment with little citation to supporting authority. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we decline to address the issue.

performance. Specifically, the prosecutor argues that defendant's assertion the he was denied the effective assistance of counsel when his lawyer failed to approach the prosecutor to attempt plea negotiations is without merit because there was nothing to show that such a plea offer was plausible under the facts of this case. We disagree.

This case presents an unusual factual situation because the asserted conflict of interest does not arise out of the joint representation of multiple defendants in a criminal case, as is typically the claim. See *People v Gallagher*, 116 Mich App 283, 292-293; 323 NW2d 366 (1982). Rather, it involves a claim that a conflict of interest existed due to the representation of a client who was not a defendant in the instant case, but who is purportedly involved in the instant case. Nevertheless, this Court has held that the legal question presented in the instant case, whether the resulting conflict of interest served to deprive defendant of the effective assistance of counsel, is the same regardless whether the facts involved the representation of clients in different litigations. Id. At 293. In either situation, the inquiry is whether the defendant received the undivided loyalty of his counsel. Id.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. Id. To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

However, when claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show

that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). In other words, the defendant bears the burden of demonstrating "that counsel 'actively represented conflicting interests' and that an actual conflict of interest adversely affected his lawyer's performance." Id. at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1709; 64 L Ed 2d 333 (1980). Although this heightened standard is not a rule of prejudice per se, an actual conflict of interest that adversely affects the adequacy of a lawyer's performance is presumptively prejudicial. *Cuyler*, *supra*; *Smith*, *supra* at 556-557.

A. Active Representation of Conflicting Interests

"An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Winkler v Keanne*, 7 F3d 304, 307 (CA 2, 1993), quoting *Cuyler*, 446 US at 356 n 3. We conclude, from our review of the record, that an actual conflict of interest existed in this case.

Defendant was represented by attorney Thaddeus Dean from the time of his arraignment in January 1994 through the time of sentencing in April 1996. Dean also represented defendant's employer, Michael Williams, and the record suggests that Dean had an ongoing attorney-client relationship with Williams' that began several years before defendant's arrest in this case. In fact, Dean continued to represent Williams through the evidentiary hearing held in this case on March 30, 2001.[4] Defendant worked at

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[4] At the evidentiary hearing, Williams was called by the defense to testify, but upon the advice of Dean, who was next to him at the hearing, Williams invoked his Fifth Amendment right against self-incrimination for each substantive question asked.

Williams's car wash, where he washed cars and ran various errands for Williams. On the day of his arrest, defendant was allegedly running an errant for Williams, driving a car provided by Williams, used by car wash employees, and kept at the car wash, when he was stopped by police for a traffic violation.[5] During a search of the car, the police found over 650 grams of cocaine under the passenger seat.

Importantly, it was Williams who retained Dean, Williams' own personal lawyer, to represent defendant. At some point after defendant's arrest, Williams informed Dean that he was the subject of a federal investigation involving drug trafficking. About one year after defendant's arrest and approximately four months prior to defendant's trial, Williams was arrested by federal agents on drug charges, stemming from a search of Williams' car was and apartment that resulted in the seizure of 2.5 kilograms of cocaine and $175,000 cash. Dean represented Williams in the federal prosecution that ensured and which was resolved by way of a plea bargain. Williams' plea bargain occurred before the commencement of defendant's trial.

These facts as found by the circuit court establish that Dean had a vested in protecting Williams while he was also representing defendant. Because Williams' was also Dean's client, Dean had an interest in protecting Williams from being implicated in any further drug charges. See *United States v Christakis*, 238 F3d 1164, 1169 (CA 9, 2001) (active conflict found where attorney continued to represent an unindicted co-conspirator during the representation of the defendant for conspiracy to distribute cocaine). Indeed, Dean admitted that a conflict of interest existed during the pretrial proceedings of defendant's case due to his loyalty to Williams. Thus, the nature of the conflict was acknowledged by Dean himself, who as the attorney for defendant, is "perhaps the best judge of whether a conflict existed." *Baty v Balkcom*, 661 F2d 391,

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[5] The car was registered in the name of Williams' girlfriend.

397 (CA 5, 19891). In fact, an attorney representing two defendants in criminal matters is in the best position professionally and ethically to determine when a conflict of interests exists or il develop. *Id.* at 397 n 11 (citations omitted). Accordingly, we find the circuit court did not clearly err in determining that Dean actively represented conflicting interests during the pretrial phase of this case.

B. Adverse Effect

With that established, the critical question becomes whether this conflict of interest adversely affected Dean's performance. To establish that a con fict of interest adversely affected counsel's performance, a defendant "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *Christakis, supra* at 1170 (citations omitted). A defendant must demonstrate that some plausible alternative defense strategy or tactic *might have been pursued*, and that the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties. *Perillo v Johnson*, 79 F3d 441, 448-450 (CA 5, 1996); *United States v Malpiedi*, 62 F3d 465, 469 (CA 2, 1995); *Winkler, supra* at 309. Under this test, the "defendant need not show that the defense [or foregone tactic] would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative." *Id.*

Contrary to the prosecution's argument, this test does not require defendant to show that the alternative tactic not pursued by conflicted counsel was reasonable or that it affected the outcome of the trial. *Malpiedi, supra*; see also *Perillo, supra.* A showing of prejudice is simply not required. *Christakis supra* at 1170. See also *Cuylar, supra.* Rather, in cases of joint representation of conflicting interests, the evil is in what the attorney finds himself compelled to refrain from doing, not only at trial but also as a pretrial plea negotiations. *Christakis, supra*, quoting *Holloway v Arkansas*, 435 US 475, 490; 98 S Ct 1173; 55 L Ed 2d 426 (1978). Indeed, "[p]lea bargains are perhaps the most obvious

example of the manifest effects of a conflict of interest at pretrial proceedings." *Baty, supra* at 397 n 12.

With these principles in mind, we find that defendant established that seeking a plea bargain in exchange for defendant's cooperation was a plausible alternative tactic that was not pursued due to Dean's admitted conflict of interest. Defendant testified that he would have done anything to save himself.[6] In light of defendant's testimony, and the fact that defendant was facing a mandatory life sentence if convicted, we believe that defendant established that he at least might have pursued plea negotiations had Dean raised the issue. Again, while we cannot predict whether such a tactic would have been successful, the outcome is not determinative. *Perillo, supra* at 449.

Second, we find that the trial court's actual finding that Dean's actual conflict influenced his decision not to advise defendant to consider plea negotiations was not a clear error. During the evidentiary hearing, Dean testified that e believed his simultaneous representation of Williams and defendant undermined is representation of defendant during pretrial proceedings in that Dean did not suggest to defendant that he consider cooperating with the authorities as an informant to gin information against Williams in exchange for a reduced plea, nor did Dean pursue such an option with the prosecution. Dean expressly admitted that his representation of Williams adversely affected his representation of defendant in that regard. The trial court was in a superior position to judge Dean's credibility and found his testimony credible with regard to whether Dean's advocacy of defendant was adversely affected by Dean's representation of Williams. We

---

[6] Although there was no evidence that defendant asked Dean to pursue plea negotiations or even raised the issue with him before or during the trial, defendant did testify during the evidentiary hearing that he relied on Dean in handling the case.

are satisfied that a plea offer might have been pursued in this case, but was not undertaken due to Dean's loyalties to Williams. See *Malpiedi, supra*. Ultimately, Dean's simultaneous representation of defendant and Williams foreclosed viable options, and as a result, defendant was adversely affected. Therefore, we hold that Dean's failure to explore the possibility of plea negotiations on behalf of defendant due to his loyalty to Williams denied defendant the Sixth Amendment right to the effective assistance of counsel.[7]

II. Newly Discovered Evidence

Although our decision on the Sixth Amendment issue already entitles defendant to a new trial, we address te prosecution's other argument as it Mich App be helpful for purposes of the new trial. The prosecutor argues that the circuit court abused its discretion when it found that an alleged post-trial statement by Williams was newly discovered evidence that required a new trial. We agree. "This Court reviews a trial court's postconviction ruling granting or denying a new trial based on newly discovered evidence for an abuse of discretion." *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.

---

[7] Our holding in this case is consistent with numerous federal circuit court decisions on this issue. See *Christakis supra*; *Lipson v United States*, 233 F3d 942, 945-948 (CA 7, 2000); *Perillo, supra*; *Malpiedi, supra*. We are also cognizant that defendant was convicted following what appears to have been a fair trial. However, we further recognize that pretrial proceedings are a critical phase of the criminal process and a co inflict of interest that adversely affects a defendant during this stage of the proceedings may warrant a new trial. See *Baty, supra* at 397.

People v Ullah, 21 Mich App 669, 673; 550 NW2d 568 (1996).

"A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Lester, supra*. Here, defendant's first appellate counsel, Glenn McCandliss, confronted Williams five years after defendant's conviction, and obtained from Williams on oral statement in which Williams allegedly admitted that he owned the cocaine that was found in the car that defendant was driving, and that defendant had no knowledge of it being in the car. We conclude, from our review of the record, that the statement fails to meet the third prong of te test. We are not persuaded that Williams' statement would render a different result probable on retrial. *Id.* Contrary to defendant's assertion that he lacked knowledge of the cocaine and denied that he was involved in drug dealing, the evidence at trial showed that defendant not only knew about the cocaine in the car, but also played a role in the drug trafficking scheme. "Moreover, possession need not be exclusive and may be joint, with more than one person actually or constructively possessing a con trolled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). The essential question is whether defendant had dominion and control over the controlled substance. Id. Here, we find that the evidence was sufficient to support a reasonable conclusion that defendant exercised dominion and control over te cocaine. See *id.* at 271-273; *People v Wolfe*, 440 Mich 508, 520-521; 489 NW2d 748, amended 441 Mich 1201 (1992). Accordingly, the statement fails to meet the test for newly discovered evidence. As such, the trial court abused its discretion in granting defendant's motion for new trial based on newly discovered evidence.

We affirm in part, reverse in part, and remand for a new trial. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

APPENDIX C

ORDER
Entered: December 26, 2002

Michigan Supreme Court
Lansing, Michigan

122264

Maura D. Corrigan
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

SC: 122264
COA: 238027
Wayne CC: 94-001010

SHAWN DEON HUTCHINSON
Defendant-Appellee.

_____/

On order of the Court, the application for leave to appeal from the August 23, 2002, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Seal

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the discretion of the Court.

December 26, 2002

Corbin R. Davis, signed
Clerk

(2)

No. 02-1203

MAR 17
CLERK

In the

Supreme Court of the United States

October Term, 2002

◇

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

SEAN DEON HUTCHINSON,

Respondent.

◇

On Petition for Writ of Certiorari to the Michigan Court of Appeals

◇

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached answer in opposition to Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

- Wayne County Circuit Court
- Michigan Court of Appeals
- Michigan Supreme Court

Respondent's affidavit or declaration in support of this motion is attached hereto.

MARK J. KRIGER

33pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Shawn Hutchinson, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$1200.00	$N/A	$1200.00	$N/A
Self-employment	$0	$N/A	$0	$N/A
Income from real property (such as rental income)	$0	$N/A	$0	$N/A
Interest and dividends	$0	$N/A	$0	$N/A
Gifts	$0	$N/A	$0	$N/A
Alimony	$0	$N/A	$0	$N/A
Child Support	$0	$N/A	$0	$N/A
Retirement (such as social security, pensions, annuities, insurance)	$0	$N/A	$0	$N/A
Disability (such as social security, insurance payments)	$0	$N/A	$0	$N/A
Unemployment payments	$0	$N/A	$0	$N/A
Public-assistance (such as welfare)	$0	$N/A	$0	$N/A
Other (specify): _____	$0	$N/A	$0	$N/A
Total monthly income:	$1200.00	$N/A	$1200.00	$N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Doug's Lounge	10070 Chicago Blvd, Detroit	12/1/02 - present	$ 1200.00 /month
#Club007	7311 E. Outer Drive Detroit	11/99 - 11/02	$ 900.00 /month
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.) N/A

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
None		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. N/A

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1 None
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets None
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed. N/A

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. ~~None~~

Name	Relationship	Age
Shaice Goodman	Daughter	11
Shawn Hutchinson, Jr.	Son	11
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 465.00	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100.00	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 250.00	$ N/A
Clothing	$ 50.00	$ N/A
Laundry and dry-cleaning	$ 20.00	$ N/A
Medical and dental expenses	$ 30.00	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 50.00	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 50.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 180.00	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 1195.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 10, 2023

Shawn Hutchinson

(Signature)

No. 02-1203

In the

Supreme Court of the United States

October Term, 2002

◇

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

SEAN DEON HUTCHINSON,

Respondent.

◇

On Petition for Writ of Certiorari to the Michigan Court of Appeals

◇

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

◇

N.C. Deday LaRene
Mark J. Kriger*
LaRene & Kriger, P.L.C.
645 Griswold St., Suite 1717
Detroit, Michigan, 48226
(313) 967-0100; (fax) (313) 967-0199

* *Counsel of Record*

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL ON THE GROUNDS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S ADMITTED ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE AND WHERE THE RECORD AMPLY SUPPORTED THE TRIAL COURT'S FINDINGS AND WHERE THE PURPORTED SPLIT BETWEEN THE CIRCUITS IS OF NO REAL SIGNIFICANCE TO SIXTH AMENDMENT JURISPRUDENCE?

COUNTER STATEMENT OF THE CASE

Respondent Shawn Hutchinson was charged by way of Information with possession with intent to deliver 650 grams or more of a mixture containing cocaine, in violation of MCL § 333.7401(2)(a)(i). He was represented at trial by attorney Thaddeus K. Dean. The case was tried by Wayne County Circuit Judge Louis F. Simmons, Jr., sitting without a jury.

According to the evidence at trial, on January 11, 1994, Respondent was driving a 1989 Black Toyota registered to one Leigh Harcourt, when Detroit police officers Robert Kane and James Schipper observed him run a stop sign at Sycamore and 12th Street in the City of Detroit, and attempted to effectuate a traffic stop. (Trial Transcript - hereinafter "TT" - pp. 5-7, 30). According to the officers, defendant did not initially stop but instead proceeded to Myrtle Street where he made a left turn on to 15th Street, and pulled into a driveway of what appeared to be a vacant dwelling. (TT, 7-8). Respondent was unable to produce a driver's license and as a result, was placed under arrest. (TT, 9-10). Officer Kane then looked inside defendant's vehicle and seized a plastic bag on the floor board of the vehicle; inside the bag were clear plastic bags containing the cocaine on which the prosecution was based. (TT, 10-13).

Respondent testified that he worked for Michael Williams, the owner of the B&B Car Wash in the City of Detroit, doing odd jobs and running errands for Mr. Williams. (TT, 44-45). He also stated that he knew Ms. Harcourt and that Ms. Harcourt was Mr. Williams's girlfriend. (TT, 46). According to Respondent, on the morning in question, Mr. Williams asked him to go to Mr. Williams's mother's house located on 15th Street, because, although the house had been boarded up

for two to three years, it had been broken into and stripped. (TT, 47-48). Respondent testified that while on his way to Mr. Williams's mother's house, he noticed the police were behind him but he did not realize the officers were trying to stop him and was not attempting to elude them. (TT, 48). He also denied that the police activated their lights or had blown their horn in an effort to have him stop. (TT, 61).

Respondent testified that he had never before seen the plastic bag in which the drugs were found, and that he was unaware of the fact that the bag contained cocaine. (TT, 51-52). He said that he did not tell the police about Mr. Williams or Ms. Harcourt because he had never been in trouble before and was worried that if he told the police about Mr. Williams or Ms. Harcourt there would be "repercussions behind it . . . I didn't know if my life was in danger or not." (TT, 64).

At the conclusion of the trial, Judge Simmons announced that he was convicting the Respondent of simple possession of 650 grams or more of a mixture containing cocaine. At the time of sentencing, however, he stated that he had intended to convict Respondent of attempted possession of 650 grams or more of a mixture containing cocaine only, and amended his verdict to so reflect, imposing the maximum sentence permissible under such a conviction, 40 to 60 months imprisonment.

The prosecution appealed the verdict and sentence and the Court of Appeals reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing. On remand, Respondent filed a Motion for New Trial, which Judge Simmons granted on the basis that a miscarriage of justice had occurred.

The prosecution again appealed and the Court of Appeals again reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of a mixture containing cocaine and for resentencing before a different judge.

Following the denial of leave to appeal by the Michigan Supreme Court, Respondent filed in the trial court a pleading entitled, "Defendant's Motion to Bar Resentencing Based upon Double Jeopardy" as well as a pleading entitled, "Defendant's Alternative Motion for a New Trial", in which he argued, *inter alia,* that he was entitled to a new trial based upon newly discovered evidence.

More specifically, the latter motion alleged that counsel had learned that in February of 1995, two federal search warrants were executed in furtherance of an investigation involving Michael Williams. One warrant was executed at Mr. Williams's apartment and the other at Mr. Williams's car wash. During the execution of the warrant at Mr. Williams's apartment, two kilos of cocaine were seized. During the execution of the search warrant at the car wash, DEA agents seized a half kilo of cocaine, $10,000 in US currency, and drug records. Williams ultimately agreed to cooperate with the authorities, entered a guilty plea to a tax violation, and served a short sentence. Following up on this information, the motion stated, counsel approached Michael Williams, who acknowledged that Mr. Hutchinson was not involved in drug trafficking, and did not indeed know about the cocaine found in the car he was driving on January 11, 1994.

Glenn McCandliss, the lawyer who filed the motion sought, and was granted, leave to withdraw, so he might be able to offer testimony regarding the statements made to him by Williams.[1]

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[1] In his testimony, Mr. McCandliss described his conversation with Michael Williams as follows:

(continued...)

[1](...continued)
(By Mr. Larene, continuing): The questions you asked him, the answers he gave you?

A. I asked him whether or not -- I said I need to know whether or not Shawn Hutchinson knew the drugs -- that there were drugs in the car in which he was driving.

Q. Did you do anything to establish in your conversation with Mr. Williams what drugs and what car you were talking about?

A. I did.

Q. How did you do that?

A. I said that -- I said that I understand that Shawn -- I said Shawn Hutchinson was pulled over in a car that was apparently registered to your girl friend, and I understand that Shawn Hutchinson was arrested in 1994. And he said that's right. And I said and there were drugs seized from that car and what I need to know is whether or not -- and my question was sort of a long question to him. I said my question clearly "I need to know whether or not Shawn Hutchinson knew there were drugs in the car, in the 1989 black Toyota in which he was driving back in January 1994. And he said no he did not know.

Q. Did you ask him another question after that?

A. I did. I asked him would Shawn Hutchinson have known about those drugs in that 1989 Toyota when he drove it on January 1994.

Q. What did he say?

A. He said no he would not have known about those drugs. Did -- to the best of your recollection, did Mr. Williams in the course of your conversation with him say anything about his own anything he might have had to do with those drugs?

A. All he told me that Shawn Hutchinson didn't have anything to do with it.

Q. Did he say anything about him, Michael Williams, having anything to do with them?

A. Other than the fact that he knew, acknowledged exactly what I was talking about. And I was making statements like, you know, your girl friend's car and your drugs and his, statements to that affect.

(continued...)

Accordingly, undersigned counsel began to represent Respondent. Undersigned counsel did not pursue the former jeopardy motion, but instead filed a supplement to the motion for a new trial, on the basis that Thaddeus Dean, Respondent's trial lawyer, also, and simultaneously, represented Michael Williams, Respondent's boss, and the person who, according to Respondent, actually possessed the cocaine which is the basis of the instant prosecution.

At the hearing on the motion, Mr. Dean admitted that his concurrent representation of Michael O'Neal Williams created an actual conflict of interest, and explained how that conflict in fact burdened his representation of Shawn Hutchinson:

> Q. At all times when you represented Shawn Hutchinson you considered Michael Williams to be your client?
>
> A. Yes.
>
> Q. You felt -- did you feel that you had a duty and loyalty to Michael Williams and to protecting his interest?
>
> A. Yes.
>
> Q. Did the fact that you had this feeling of loyalty and obligation to Michael Williams as your client keep you from doing anything in your representation of Shawn Hutchinson?
>
> A. I'd say yes.

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[1](...continued)

> Q. You referred to the drugs as his drugs?
>
> A. I believe he did.
>
> Q. He did or you did?
>
> A. He did. I asked him -- I asked him about these drugs as his drugs and he said yes.

(Transcript, 2/22/01, pp. 25-27).

Q. Please explain what that might have been.

A. Well during say, for instance, my representation of Mike Williams, there were negotiations which went forth in an effort to undercut the seriousness of his situation and was resolved through cooperation. That was never -- that opportunity was never afforded Shawn Hutchinson.

Q. What do you mean?

A. I never suggested to Shawn that he could possibly seek a resolution of the charges against him by becoming an informant for the government.

Q. Did you ever approach anybody in either the federal or state prosecutive authorities and ask if there was any interest in having Shawn Hutchinson become an informant or witness or operative against Michael Williams?

A. No.

Q. And it was because of your duty to your client Michael Williams?

A. Yes.

Q. There was a year about that went by from between the time of Michael -- of Shawn Hutchinson's arrest and the time of Michael Williams' arrest, right?

A. Yes.

Q. During that period of time, were you aware of the fact that there was a federal investigation of Michael Williams and federal interest in Michael Williams, alleged or suspected drug trafficking?

A. Yes.

Q. And that would have been a time in which you, had you not felt that you owed a duty to protect Michael Williams your client's interest, that it would have been appropriate for you to approach either the state authorities or at least the federal authorities to see if they could -- you could gain leniency for Mr. Hutchinson as a result of his help in their investigation of Michael Williams?

A. There would have been time to do that, yeah.

Q. Now Michael -- excuse me. Shawn Hutchinson testified in his own defense, correct?

A. Correct.

Q. And he said in his trial under oath that he didn't know anything about drug trafficking at the B & B Car wash, correct? That he was an innocent naive?

A. I think so, yes.

Q. If in fact Michael -- excuse me -- Shawn Hutchinson didn't know anything or maintained that he didn't know anything about Michael Williams, how could he have done himself any good?

A. Shawn, in my opinion, was close enough to Mike Williams where he could have provided information. He could have recorded conversations. He could have recorded phone calls. He could have probably done --

Q. Could have drawn information from Mr. Williams?

MR. SIMON [Assistant Prosecuting Attorney]: Judge, I know there could have been lots of objections. I just have to object as being leading cause I don't want to waste any time. But we are getting a little bit far over the edge now.

MR. LARENE: I agree and I apologize.

Q. (By Mr. Larene, continuing): I'm sorry. Please continue.

A. He could have gotten information. He could have worn a body mike. I mean there is a lot of things that he could have done conceivably to gather information. He could have stuck his ear to the door.

There was an office which divided the car wash generally where Shawn was from the office area of the building. And I am sure Shawn could have hung around that door and listened for stuff if he had been motivated to do so.

Q. You never suggested it?

A. No, no.

(Transcript, 2/22/01, pp. 63-67).

Respondent testified that if he had been "afforded the opportunity" to cooperate with the authorities in order to exonerate himself, or to gain some measure of leniency, he would have been willing to do so, and that, in his estimation, such efforts would likely have been fruitful:

Q. Now in the course of your representation -- or strike that.

In the course of Mr. Dean's representation in this case, did he ever indicate to you in any way, shape, manner or form that one option you would have would be to cooperate with the police against Mr. Williams?

A. No, he never afforded me that opportunity.

MR. KRIGER: One moment, Your Honor.

(By Mr. Kriger, continuing): Now did Mr. Dean suggest a course of action relative to how this case should proceed?

A. He just told me that we were going to take a bench trial in front of Judge Simmons and that that would be the best way for us to see ourselves winning the case.

Q. And did you rely on that advice?

A. Yes, I did.

Q. Had Mr. Dean suggested to you that one option would have been to cooperate in return for lesser charges or maybe even a dismissal, would have that been an option that you would have liked to have explored?

A. Mr. Kriger, I was looking at life in prison for a person who have never committed a crime in his life.

So I would have been available -- I would have been open for any options that would have been afforded to me,

Q. Would have you been willing to wear a microphone or a wire to record conversations with Mr. Williams?

A. As I said, again I would have been willing to do whatever it took to save myself, sir.

Q. Would have you been willing to record telephone conversations with Mr. Williams?

A. Yes.

Q. Okay. You had testified at trial that you were unaware of the fact that Mr. Williams was involved in cocaine when you were working at the car wash; is that correct?

A. Yes. From what I knew, he didn't deal in cocaine.

Q. Okay.

A. From my knowledge.

Q. Until you were arrested?

A. Right.

Q. When you were arrested with two kilos of cocaine in the car, did your opinion about Mr. Williams and his involvement in cocaine change at that point?

A. Most definitely.

Q. You felt he was responsible for that?

A. Yes.

Q. Now if you had been willing to record telephone conversations or speak, do you think Mr. Williams would have been willing to even talk about the cocaine?

A. I'm sure he would have.

Q. Why do you say that?

A. Cause obviously it was his loss and not mine.

Q. All right. Did he have any conversation with you which indicated that he was taking responsibility for this cocaine when you called him from the station house?

A. No, other than him being apologetic of what took place.

Q. When he apologized to you, what did you take that to mean?

A. I took that to mean that he knew exactly what was in the vehicle.

(Transcript, 4/11/01, pp. 8-10).

The Hon. Carole F. Youngblood, Wayne County Circuit Judge, to whom the case was reassigned on the second remand by the Court of Appeals, held that trial counsel's admitted active conflict of interest adversely affected his representation of Shawn Hutchinson, and required the grant of a new trial:

> A claim of ineffective assistance of counsel is analyzed by the court applying a two-pronged test. Strickland [v Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984)];People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994); People v Rhinehart, 149 Mich App 172 (1986). A defendant must show (1) his counsel's performance was deficient and (2) this performance prejudiced the defense depriving the defendant of a fair trial. Strickland, supra; Hall [v United States,] 200 F3d [962,] 965 [6th Cir. 2000)].
>
> When the claim is based on an actual conflict of interest, the standard is different. Hall, supra; Rhinehart, supra; People v Simmons, 134 Mich App 779, 788, 352 NW2d 275 (1984). When an actual conflict of interest exists, prejudice is presumed. Hall, supra. Where it is demonstrated that an attorney made a choice which was helpful to one client and harmful to the other, an actual conflict of interest is demonstrated. United States v Mers, 701 F2d 1321, 1328 (11th Cir. 1983).
>
> The prosecution's argument that the defendant's failure to object to the conflict of interest at trial requires him to establish that the actual conflict of interest adversely affected his defense is without merit. There is no evidence that the defendant had any knowledge that a conflict of interest existed or that he had any reason to suspect such a conflict. In addition, the defendant has clearly demonstrated that Mr. Dean's disloyalty and breach of his duties did affect his defense.
>
> Here an actual conflict of interest did exist based on Mr. Dean's representation of the defendant and Michael Williams at the same time and over the same subject matter. Mr. Dean admitted that this representation of Mr. Hutchinson was compromised based on his representation of Mr. Williams. He admitted that he

failed to pursue negotiations with the prosecutor based on his representation of Mr. Williams.

Mr. Dean had represented Michael Williams prior to the date of the defendant's arrest on drug related matters. Mr. Dean knew that there was a pending federal investigation of Michael Williams for drug trafficking while he was representing Mr. Hutchinson. Mr. Dean knew that the drugs which Mr. Hutchinson was charged with possessing were found in Mr. Williams' car. Mr. Dean knew that the defendant was driving that car at the direction of Mr. Williams to do an errand. Clearly Mr. Dean always knew that the drugs found in that car belonged to Mr. Williams and that Mr. Hutchinson was actually innocent.

Mr. Dean failed to bring forth any of this information at Mr. Hutchinson's trial. He failed to call witnesses that could corroborate that Mr. Williams owned the car, that the defendant worked at the car wash doing only car-wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that Mr. Hutchinson was a person who lived paycheck-to-paycheck and was not associated with any, drug-related activities. Clearly Mr. Dean failed to call such witnesses and put forth such information about Mr. Williams because Mr. Williams was his client and paying for Mr. Hutchinson's defense.

It is difficult to imagine a clearer conflict of interest. The interests of Mr. Hutchinson and Mr. Williams could not have been more in conflict. This court is not aware of a more obvious and extreme example of an actual conflict of interest. Cuyler v Sullivan, 446 US 335, 350 (1980); United States v Christakis, 238 F.3d 1164, 1170-71 (9th Cir. 2001).

Once a defendant shows an actual conflict of interest, he need not demonstrate actual prejudice. Cuyler v Sullivan, supra, Mickens v Taylor, 227 F.3d 203, 219 (4th Cir. 2000). However, here the defendant has shown substantial and real prejudice. Mr. Dean breached his most basic duty of loyalty to Mr. Hutchinson. This breach of loyalty began the moment he entered a courtroom on behalf of Mr. Hutchinson and continued throughout his pretrial failure to negotiate on behalf of Mr. Hutchinson and his failure to provide Mr. Hutchinson with an adequate defense at trial.

(Opinion, November 13, 2001, pp. 7-10).

Judge Youngblood also granted the Motion for New Trial on the issue of newly discovered evidence. The Court of Appeals granted the prosecution's Application for Leave to Appeal, and, in an unpublished opinion, reversed the trial court on the newly-discovered evidence issue, but upheld

the grant of a new trial on the basis of trial counsel's conflict of interest. In this regard, the Court of Appeals held:

> The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).
>
> However, when claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). In other words, the defendant bears the burden of demonstrating "that counsel 'actively represented conflicting interests' and that an actual conflict of interest adversely affected his lawyer's performance." Id. at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1708; 64 L Ed 2d 333 (1980). Although this heightened standard is not a rule of prejudice per se, an actual conflict of interest that adversely affects the adequacy of a lawyer's performance is presumptively *prejudicial. Cuyler, supra*; *Smith, supra* at 556-557.
>
> A. Active Representation of Conflicting Interests
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> "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Winkler v Keane*, 7 F3d 304, 307 (CA 2,1993), quoting *Cuyler,* 446 US at 356 n 3. We conclude, from our review of the record, that an actual conflict of interest existed in this case.
>
> Defendant was represented by attorney Thaddeus Dean from the time of his arraignment in January 1994 through the time of sentencing in April 1996. Dean also represented defendant's employer, Michael Williams, and the record suggests that Dean had an ongoing attorney-client relationship with Williams' that began several years before defendant's arrest in this case. In fact, Dean continued to represent Williams through the evidentiary hearing held in this case on March 30, 2001. Defendant worked at Williams' car wash, where he washed cars and ran various errands for Williams. On the day of his arrest, defendant was allegedly running an errand for Williams, driving a car provided by Williams, used by car wash

employees, and kept at the car wash, when he was stopped by police for a traffic violation. During a search of the car, the police found over 650 grams of cocaine under the passenger seat.

Importantly, it was Williams who retained Dean, Williams' own personal lawyer, to represent defendant. At some point after defendant's arrest, Williams informed Dean that he was the subject of a federal investigation involving drug trafficking. About one year after defendant's arrest and approximately four months prior to defendant's trial, Williams was arrested by federal agents on drug charges, stemming from a search of Williams' car wash and apartment that resulted in the seizure of 2.5 kilograms of cocaine and $175,000 cash. Dean represented Williams in the federal prosecution that ensued and which was resolved by way of a plea bargain. Williams' plea bargain occurred before the commencement of defendant's trial.

These facts as found by the circuit court establish that Dean had a vested interest in protecting Williams while he was also representing defendant. Because Williams' was also Dean's client, Dean had an interest in protecting Williams from being implicated in any further drug charges. See *United States v Christakis*, 238 F3d 1164, 1169 (CA 9, 2001) (active conflict found where attorney continued to represent an unindicted co-conspirator during the representation of the defendant for conspiracy to distribute cocaine). Indeed, Dean admitted that a conflict of interest existed during the pretrial proceedings of defendant's case due to his loyalty to Williams. Thus, the nature of the conflict was acknowledged by Dean himself, who as the attorney for defendant, is "perhaps the best judge of whether a conflict existed." *Baty v Balkcom,* 661 F2d 391, 397 (CA 5, 1981). In fact, an attorney representing two defendants in criminal matters is in the best position professionally and ethically to determine when a conflict of interests exists or will develop. *Id.* at 397 n 11 (citations omitted). Accordingly, we find the circuit court did not clearly err in determining that Dean actively represented conflicting interests during the pretrial phase of this case.

B. Adverse Effect

With that established, the critical question becomes whether this conflict of interest adversely affected Dean's performance. To establish that a conflict of interest adversely affected counsel's performance, a defendant "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *Christakis, supra* at 1170 (citations omitted). A defendant must demonstrate that some plausible alternative defense strategy or tactic *might have been pursued,* and that the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties. *Perillo v Johnson,* 79 F3d 441, 448-450 (CA 5, 1996);*United States v*

Malpiedi, 62 F3d 465, 469 (CA 2, 1995); *Winkler, supra* at 309. Under this test, the "defendant need not show that the defense [or foregone tactic] would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative." *Id.*

Contrary to the prosecution's argument, this test does not require defendant to show that the alternative tactic not pursued by conflicted counsel was reasonable or that it affected the outcome of the trial. *Malpiedi, supra;* see also *Perillo, supra.* A showing of prejudice is simply not required. *Christakis, supra* at 1170. See also *Cuyler, supra.* Rather, in cases of joint representation of conflicting interests, the evil is in what the attorney finds himself compelled to refrain from doing, not only at trial but also as to pretrial plea negotiations. *Christakis,* supra, quoting *Holloway v Arkansas*, 435 US 475, 490; 98 S Ct 1173; 55 L Ed 2d 426 (1978). Indeed,"[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings." *Baty, supra* at 397 n 12.

With these principles in mind, we find that defendant established that seeking a plea bargain in exchange for defendant's cooperation was a plausible alternative tactic that was not pursued due to Dean's admitted conflict of interest. Defendant testified that he would have done anything to save himself. In light of defendant's testimony, and the fact that defendant was facing a mandatory life sentence if convicted, we believe that defendant established that he at least might have pursued plea negotiations had Dean raised the issue. Again, while we cannot predict whether such a tactic would have been successful, the outcome is not *determinative. Perillo, supra* at 449.

Second, we find that the trial court's factual finding that Dean's actual conflict influenced his decision not to advise defendant to consider plea negotiations was not a clear error. During the evidentiary hearing, Dean testified that he believed his simultaneous representation of Williams and defendant undermined his representation of defendant during pretrial proceedings in that Dean did not suggest to defendant that he consider cooperating with the authorities as an informant to gain information against Williams in exchange for a reduced plea, nor did Dean pursue such an option with the prosecution. Dean expressly admitted that his representation of Williams adversely affected his representation of defendant in that regard. The trial court was in a superior position to judge Dean's credibility and found his testimony credible with regard to whether Dean's advocacy of defendant was adversely affected by Dean's representation of Williams. We are satisfied that a plea offer might have been pursued in this case, but was not undertaken due to Dean's loyalties to Williams. See *Malpiedi, supra.* Ultimately, Dean's simultaneous representation of defendant and Williams foreclosed viable options, and as a result, defendant was adversely affected. Therefore, we hold that Dean's failure to explore the possibility of plea negotiations on behalf of defendant due to his loyalty to

Williams denied defendant the Sixth Amendment right to the effective assistance of counsel.

(Michigan Court of Appeals, Slip Opinion, pp. 2-5) (footnotes omitted).

REASON FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL ON THE GROUNDS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S ADMITTED ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE, WHERE THE RECORD AMPLY SUPPORTED THE TRIAL COURT'S FINDINGS, AND WHERE THE PURPORTED SPLIT BETWEEN THE CIRCUITS IS OF NO REAL SIGNIFICANCE TO SIXTH AMENDMENT JURISPRUDENCE.

The basic constitutional rule is clear, and the prosecution does not claim that either of the courts below erred in stating it: "'prejudice is presumed when counsel is burdened by an actual conflict of interest,' although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance." *Smith v Robbins,* 528 US 259, 287 (2000) (quoting *Strickland v Washington*, 466 US 668, 692 (1984).[2] The prosecution, however, seizes upon a single sentence from the Michigan Court of Appeals' opinion which it claims demonstrates that the panel was required to choose between divergent definitions of the phrase "adversely affected," chose the wrong one, and was thus led to an improper result.

Respondent maintains however, that the purported doctrinal split is of no real significance, either to Sixth Amendment jurisprudence, or to the result in this case, and that there is simply no

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[2] This is, of course, a slightly different rule than that applied where a claim of ineffective assistance is based on counsel's deficient performance. There prejudice must be shown; that is, a reasonable probability that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland v Washington, supra*, at 689 (1984).

basis for this Court to conclude that the decision of the Michigan Court of Appeals is either erroneous, or otherwise in need of correction.

In *Cuyler v Sullivan,* 446 US 335, 349-350 (1980), this Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." As this Court later explained in *Strickland v Washington, supra,* "[i]n those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties," and a presumption of prejudice is appropriate because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Id.,* at 692.

The prosecution calls upon this Court to resolve what it describes as "an apparent split in the Federal Courts of Appeal over the meaning or practical application of the [*Cuyler v Sullivan*] test." The purported "circuit split" upon which the prosecution premises its Petition only applies to one species of active conflict cases: where the fact that a lawyer representing "actively conflicting interests"[3] (as defendant's trial counsel here admittedly was) fails to pursue a course of action (as defendant's trial counsel here admittedly did).

All the federal cases hold that a defendant must show that "some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v Malpiedi,* 62 F3d 465, 469 (2nd Cir. 1995), *cert denied,* 521 US 1111 (internal quotation marks and citations omitted); *Mickens v Taylor,* 240 F3d 348, 361 (4th Cir. 2001), *affirmed on other grounds,* ___ US

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[3] *Cuyler v Sullivan, supra,* at 350.

___; 122 SCt. 1237; 152 LEd 2d 291 (2002); *Freund v Butterworth*, 165 F3d 839, 860 (11th Cir. 1999); *Perillo v Johnson*, 79 F3d 441, 448-450 (5th Cir. 1996); *Church v Sullivan*, 942 F2d 1501, 1512 (10th Cir.1991); *United States v Fahey*, 769 F2d 829, 836 (1st Cir. 1985). Some of these courts have added the gloss that the alternative strategy or tactic must be shown to have been "reasonable." *Mickens v Taylor, supra*; *Freund v Butterworth, supra*. All courts agree, however, that the defendant need not show that pursuit of the unpursued option would have changed the outcome of the proceedings.

Whatever the difference between "plausible" and "plausible and reasonable" - the two concepts do not seem all that different[4] - the prosecution's argument that the pursuit of a cooperation was not "reasonable" flies in the face of the record and the law. As the Michigan Court of Appeals noted, the defendant "was facing a mandatory life sentence if convicted," and in light of his testimony to the effect that he "would have done anything to save himself" the Court's conclusion that he "established that he at least might have pursued plea negotiations" unexceptionable, and the pursuit of such an attempt eminently "reasonable" under any view. Moreover, the trial court's findings that "Mr. Dean failed to call witnesses that could corroborate that Mr. Williams owned the car wash, that the defendant worked at the car wash doing only car wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that defendant lived pay check to paycheck and was not associated with any drug activities" were amply supported

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[4] This Court has not yet seem to have found the distinction so significant as to require the grant of *certiorari* to resolve any such conflict although it has had the opportunity to do so. This Court has, however, in a case with a fact pattern analytically similar to the one at bar, noted that if "counsel was influenced in his basic strategic decisions by the interests of the employer who hired him" to represent employee-defendants, " the due process rights of [the employees] were not respected. *Wood v Georgia*, 450 US 261, 272 (1981).

by the record. Likewise, trial court's finding, based on trial counsel's own admission, that he failed to pursue plea negotiations because of his admitted concurrent representation of Mr. Williams who at the time was under investigation by the federal authorities for drug trafficking is amply supported by the record.

It is well established that "a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses.'" *Amadeo v Zant*, 486 US 214, 223 (1988). In applying this standard, this Court has stated that "we, like any reviewing court, will not reverse a lower court's finding of fact simply because we 'would have decided the case differently.' Rather, a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'" *Easley v Cromartie*, 532 US 234, 242 (2001). Based on the trial court record, it simply cannot be seriously argued that the trial judge's findings were clearly erroneous.

In any event, the Michigan Court of Appeals' conclusion that "while we cannot predict whether such a tactic would have been successful, the outcome is not determinative" (Slip Opinion, p. 4), is in exact accord with the federal decisions. *See, e.g., United States v Christakis*, 238 F3d 1164, 1170-1171 (9th Cir. 2001) ("Christakis need not demonstrate that the government would have reduced his sentence if he had provided information implicating DiCesare. Rather, he need only show that Sherman's interest in protecting DiCesare likely affected his decision not to advise Christakis to consider pursuing a deal with the government.")

In support of its "unreasonableness" position, the prosecution advances the same arguments it did to the trial court (post-hearing Memorandum, pp. 37-39) and the Court of Appeals (Brief on

Appeal, pp. 30-33): that defendant's potential offered cooperation was inconsistent with his post-arrest statement that he was unemployed (Petition for Certiorari, p. 28),[5] that there was good reason for trial counsel "not to suggest to Defendant that he try to provide information about Williams, which had nothing to do with the fact that Dean was also representing Williams" (Petition for Certiorari, pp. 28), and that it is "rather inconceivable," and inconsistent with defendant's trial testimony that he and Williams had fallen out, that he could have really gathered information. (Petition for Certiorari, pp. 29). However, the prosecution gives the Court no basis upon which it might conclude that the rejection of these arguments by the courts below was "clearly erroneous."

It will be recalled that the defendant Hutchinson testified that he was "sure" that Michael Williams would have made incriminating statements to him (Transcript, 4/11/01, pp. 9-10), and that Thaddeus Dean, who obviously knew both men, was of the opinion that the defendant "was close enough to Mike Williams where he could have provided information" in a variety of ways, from wearing a microphone, to "hanging around" Williams's office door. (Transcript, 2/22/01, pp. 66-67). The trial judge did not reject that testimony, nor did the Court of Appeals, and the prosecution offers

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[5] The prosecution also suggests here in passing that the conflict of interest claim could have been deemed waived by the failure to present it in defendant's first motion for new trial. The Court of Appeals held this argument to itself have been forfeited by its cursory presentation by the prosecution. (Slip Opinion, p. 2, n. 3). In any event, the case which the prosecution cited, and cites, in support of its position, *United States v Reed*, 179 F3d 622, 625-626 (8th Cir.1999), is simply inapposite. There, the court upheld a finding of waiver on the basis that the defendant "concealed" the conflict from the court, repeatedly expressing his satisfaction with counsel, and personally rejecting a government offer to cooperate against the fee-paying coconspirator. Not only are the facts of *Reed* markedly different from those of the case at bar, the defendant Hutchinson explained his acquiescence in Mr. Dean's conflicted representation because he could not afford to hire his own lawyer, and had heard bad things about court-appointed attorneys; he was, as he said at one point, "brand new to this." (Transcript, 4/11/01, pp. 10, 13, 20, 24-25). This is hardly the stuff of which waiver of the most basic Sixth Amendment protections is made.

no reason for this Court to do so. Whether or not Mr. Hutchinson's efforts to gather information would have been ultimately successful is not, of course, the question.[6]

As to the suggestion that there may have been other reasons not to suggest cooperation, the simple, and conclusive, answer is that Mr. Dean's testimony - credited by the trial judge, and the Court of Appeals - makes clear that it was an actual conflict of interest, not strategic considerations, which kept him from pursuing this course. The prosecution's argument that if Hutchinson did cooperate, Williams might have been spurred to give information against him borders on the absurd. Mr. Williams did not begin cooperating with the authorities for more than a year following Mr. Hutchinson's arrest. Moreover, Williams's statements to Mr. Hutchinson's appellate attorney, Glen McCandliss, suggest that Mr. Hutchinson was simply not involved in Williams's drug trafficking. And even if he were, is it "reasonable" to suggest that the authorities would have been interested in turning the whale against the minnow?

As to defendant's trial testimony regarding his falling out with Williams, for some reason the prosecution did not see fit to confront Mr. Hutchinson on this issue at the evidentiary hearing, so he was unable to explain it. However, logic and common sense suggest that a person who wished to exploit another's confidence, in order to secure damaging admissions, might well avoid such a "falling out," or act as if he wanted to make amends. And, as noted above, both Mr. Hutchinson

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[6] The prosecution's suggestion (Petition for Certiorari, p. 32) that law enforcement authorities - who were already investigating Williams - would not have been interested in hearing from the defendant, who was found driving a car registered to Williams's girlfriend, and containing almost a kilogram of cocaine, simply because he had denied working for Williams following his arrest assumes a degree of naivete on the part of the narcotics investigators which is simply inconsistent with human experience. Moreover, even if the police had been skeptical of Hutchinson's ability to produce, what would it have cost them to let him try?

and Mr. Dean testified at the evidentiary hearing that, given their knowledge of the relationship between Hutchinson and Williams, it was likely that Hutchinson could have obtained incriminating evidence, either directly or surreptitiously, the trial judge accepted that testimony, the Court of Appeals did not disturb those findings, and the prosecution offers no reasoned basis to set them aside.

Finally, Petitioner does not even address, let alone offer an explanation of why, the trial court's findings that "Mr. Dean failed to call witnesses that could corroborate that Mr. Williams owned the car wash, that the defendant worked at the car wash doing only car wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that defendant lived pay check to paycheck and was not associated with any drug activities" were unreasonable.[7]

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[7] While Petitioner states that "Respondent's conflict of interest claim did not pertain to anything that occurred at trial . . ." (Petition for Writ of Certiorari, p. 28), it is clear that the trial court found otherwise.

SUMMARY AND RELIEF REQUESTED

The Petitioner's Petition for Writ of Certiorari does not even remotely approach the kind of showing required to invoke this Court's discretionary jurisdiction under Supreme Court Rule 10. Accordingly, the Court should deny the Petition for Certiorari.

Respectfully submitted,

LARENE & KRIGER, PLC

Attorneys for Respondent
Penobscot Building
645 Griswold Street, Suite 1717
Detroit, Michigan 48226
(313) 967-0100

BY: _____
N. C. DEDAY LARENE (P16420)

BY: _____
MARK J. KRIGER (P30298)

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